MPI

2nd Edition

Montana Pattern Instructions

(Civil)

State Bar of Montana

2003

MONTANA PATTERN INSTRUCTIONS

(MPI)

(Civil)

JANUARY, 2003 EDITION

Prepared by the
MONTANA SUPREME COURT COMMISSION
ON CIVIL JURY INSTRUCTION GUIDELINES

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MONTANA PATTERN INSTRUCTIONS, SECOND (MPI2d)

January, 2003

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Montana Pattern Instructions
January, 2003 Edition

MPI 2d

Chapter 1 - General

INSTRUCTION NO._____

You have been called here today for possible selection as a juror in a civil case. Your name was randomly drawn from the list of citizens registered to vote in this county. The following remarks are intended as an outline of the selection process.

The party bringing the action is called the plaintiff. [State plaintiff's name and indicate where person or corporate representative is seated.] The plaintiff is represented by: [State name and ask to rise.] The defendant is [State defendant's name and indicate where person or corporate representative is seated.] The defendant is represented by [State name and ask to rise.] [Identify other parties and their representatives in a like manner.] From time to time throughout the trial the attorneys may be addressed as "counsel."

[State concisely the nature of the case.]

We select the jury by a process called "voir dire." The literal meaning of the term is "to speak the truth." It comes down to us from antiquity and in practice means questioning prospective jurors, under oath, to determine if they are qualified to serve.

You may serve as a juror if you are registered to vote in this county. You may not serve if you have been convicted of a felony or of malfeasance in office, until you have served your sentence or paid your fine and been released from state supervision. Beyond these statutory qualifications is the

universally accepted qualification that the juror be impartial -- that he or she can decide the case fairly. It is to the qualification of fairness that voir dire is addressed.

In this case we are seeking _____ jurors. They will be selected as follows: First, you will all be sworn to give true answers to all questions. The first _____ of you will then be examined "for cause," -- that is to say, is there any cause that can be shown for challenging your qualification to serve. You might find a question asked on such an examination to be somewhat personal, even embarrassing. It is not intended to be so. It is asked because counsel believes the answer will assist in determining your qualification to serve, and for no other reason. Because the plaintiff bears the burden of proof, counsel for the plaintiff will be permitted to question you first and then the defendant's counsel may question you. If counsel believes one of you should be excused, you will be "challenged for cause." The challenge is addressed to the Court, which must decide whether the juror will be excused. If the juror is excused, he or she will be replaced by another prospective juror. This process continues until counsel for all parties have announced they "pass the jury for cause." We will at that time have a group of ___ qualified jurors. Counsel for each party may then exercise ___ "peremptory challenges" -- challenges for which no cause or reason need be

given. When the parties have exercised their peremptory challenges there will remain the required ___ jurors.

You should not take a challenge for cause or a peremptory challenge personally. A juror selected for today's trial may well be excused for the next trial, and a juror excused today might well be, and frequently is, selected for the next trial.

The clerk will swear the prospective jurors.

Given:_____
District Judge

Comment: This instruction should be used after the attorneys for the parties have declared themselves ready for trial and the clerk has called the roll of jurors. This instruction need not be submitted with other instructions when the jury is sent to deliberate.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

You have been sworn as the jury to try this case. As such, your primary duty is to decide the disputed issues of fact. I will decide the questions of law that arise during the course of the trial, and, after you have received all of the evidence, I will give you, orally and in writing, instructions on the law that you are bound to follow and apply in reaching your verdict.

It is, then, your duty to hear and see clearly all of the evidence presented to you in this courtroom –- and nowhere else; to sift, measure and balance that evidence carefully; to conclude from the evidence what the true facts are; to apply the law as given to you -- and only that law -- to the facts you have found, and thereby reach a just verdict.

It is my duty to conduct the trial in an orderly, fair and efficient manner to the end that the interests of all parties can be heard and considered by you.

Let me explain briefly the general order of procedure in the trial from this point forward.

First, plaintiff’s counsel will make an opening statement outlining the plaintiff's case. Counsel for the defendant may then make an opening statement or reserve it until the close of the plaintiff’s case. These opening statements are intended to

assist you in understanding the viewpoints of the parties. Statements of counsel are not evidence.

Following the opening statements, evidence will be presented. Because the plaintiff has the burden of proof, the plaintiff's case is presented first. This is sometimes referred to as the plaintiff's "case in chief". Counsel for the defendant has a right to cross-examine the plaintiff's witnesses. Following the plaintiff's presentation, the defendant has the opportunity to present evidence and plaintiff's counsel may cross-examine. After the defendant's case is presented, both sides may present rebuttal evidence.

After all the evidence has been presented, I will determine the applicable law after considering the views of counsel. This is called "settling instructions". We will then go back into session and the instructions will be read to you.

Following the reading of instructions, counsel may argue their cases. You are again reminded that the statements of the attorneys in closing arguments, as in opening statements, are not evidence but are intended only to assist you in evaluating the evidence and understanding the theory of the parties.

When the attorneys have completed their closing arguments you will go to the jury room to deliberate and reach a verdict. You will take with you the exhibits that have been received into

evidence and a copy of the instructions that have been read to you.

When you have reached a verdict you will return to the courtroom and announce your decision.

Given:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)
Disposition G____R____W____

INSTRUCTION NO._____

You are the sole judges of the facts in this case. It is up to you to determine which witnesses you will believe and what weight will be given to their testimony. In doing so, you may consider, for example, such things as their demeanor, apparent bias or prejudice, motive to testify truthfully or falsely, consistency, ability and opportunity to perceive, recall and communicate, or the over-all reasonableness of their testimony in the light of all the other evidence.

At the outset, a witness is entitled to a presumption that his or her testimony is truthful. This presumption may be overcome, however, by any evidence tending to disprove that testimony or raising a substantial question as to the witness' credibility. A witness false in one part of his or her testimony is to be distrusted in others. However, this rule does not apply to a witness who unintentionally commits an error. If weaker and less satisfactory evidence is offered and it appears that it is within the power of the party to offer stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

You should not be persuaded as to a particular fact simply because a greater number of witnesses testified to that fact if the contrary testimony of fewer witnesses is more convincing.

Where two witnesses testify directly opposite each other and are the only ones who testify on the same point, you are not bound

to consider the evidence evenly balanced. You may regard all of the related evidence and give credence to one witness or the other. The evidence of any witness who you believe is sufficient proof of any fact.

You have a right to consider all of the evidence in the light of your own general knowledge, experience and common sense. Your determination of the facts must be based on the evidence presented, regardless of which side presents it. You are not to regard arguments, statements and remarks of attorneys as evidence and you should disregard them if they are not supported by evidence properly presented and received.

No act, remark, instruction, interrogation or ruling by me is to be construed by you as being any indication whatever of any opinion I might have as to what facts you should or might find.

GIVEN:_____
District Judge

Source: MCA 26-1-303
Proposed by P(#____), D(#____), Ct(#____)
Disposition G____R____W____

INSTRUCTION NO._____

In a civil case, such as this one, the party that makes a claim must prove that claim by the greater weight of the evidence, sometimes referred to as the preponderance of the evidence. This is called the burden of proof.

A party who has the burden of proof must persuade you by the evidence that his/her claim is more probably true than not true. In other words, the evidence supporting the propositions, which a party has the burden of proving, must outweigh the evidence opposed to it. In determining whether a party has met this burden, you will consider all the evidence, whether produced by the plaintiff or defendant.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 1.03 General - Burden of Proof (Preponderance of the Evidence)

INSTRUCTION NO._____

The only evidence you will consider in this case must come to you while you are together as a jury in the courtroom, in the presence of the judge, the attorneys and the parties. You must not consider any information about this case, which may come to you outside the courtroom. You must not discuss the case with anyone -- not even members of your family or your fellow jurors -- before you retire to consider your verdict. Even after the case is submitted to you for deliberation, you still must discuss it only in the jury room and in the presence of your fellow jurors.

During recesses, you must not discuss the case amongst yourselves or with anyone else, nor should you allow anyone to say anything to you or in your presence about this case. If anyone does try to say anything to you or in your presence about this case, you should advise him or her that you are on a jury hearing the case and ask them to stop. If they do not, you should advise the bailiff, who will advise me and I will take appropriate action.

Therefore, there are some persons with whom you should not talk even if the conversation has nothing to do with the case. You should not talk with the parties, their representatives, their attorneys or their witnesses. It is necessary to avoid even the

appearance of unfairness or improper conduct.

You should not read newspaper headlines or articles relating to the trial. You must not watch or listen to television and radio comments or accounts of the trial while it is in progress.

You must not make any investigations on your own, view any material objects not presented in court or conduct any experiments of any kind. [I would particularly warn you against inspecting the accident scene involved in this lawsuit.]

Failure to observe these precautions might require the retrial of this case, which would result in long delay, considerable expense to the county and the parties and a waste of your time and effort.

Given:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

From time to time counsel may make objections and motions and I will rule on them. Most of the time I will make these ruling in your presence. You should not conclude from any of my rulings that I have an opinion on the merits of the case, or that I favor one side or the other. If I sustain an objection to a question and do not permit the witness to answer, you should not guess what the answer might have been, nor draw any inference from the questions itself.

Sometimes the attorneys and I are required by law and considerations of fair trial to take up the matter of objections and motions outside your hearing. We may take care of these matters at the bench or in chambers, or I may excuse you so that arguments can be heard in the courtroom. Normally these involve purely procedural matters, which have nothing to do with your function as jurors. They are conducted in your absence for the sake of convenience and also to avoid unnecessary confusion. I will conduct these conferences so as to use as little of your time as possible.

Given:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 1.05 General - Objections and Motions

INSTRUCTION NO._____

To assist your understanding of these proceedings, I offer the following definitions of some commonly used legal terms:

"Direct examination" is the questioning of a witness by counsel for the party presenting the witness. "Cross examination" is the questioning of a witness by counsel for an opposing party on the subject of the direct examination.

A "leading question" is a question, which suggests to the witness the answer that the examining party desires. Generally speaking, leading questions are not permitted on direct examination but are permitted on cross-examination.

"Hearsay" is the statement of a person, other than the witness offering it, which is offered as proof of the truth of the matter asserted in the statement. For example: "John told me (the witness) that Harry stole my horse."

A Court may take "judicial notice" of some facts that don't require proof (i.e., the world is round). I will advise you as to which facts, if any, you may take judicial notice.

There are generally speaking, two types of evidence. One is "direct evidence" -- such as the testimony of an eye-witness. The other is "circumstantial evidence", which is proof of facts from which other facts might be inferred. The law makes no distinction

between direct and circumstantial evidence. A case can be proved with either.

Given:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

If you wish, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note taking distract you so that you do not hear other answers by witnesses. When you leave at night, leave your notes in the jury room.

If you do not take notes, you should rely upon your own memory of what was said and not be overly influenced by the notes of other jurors.

Given:_____
District Judge

Source: Ninth Circuit Model Jury Instruction No. 1.12 (1985)

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 1.07 General - Note Taking Allowed

INSTRUCTION NO._____

The testimony of a witness will now be presented to you by deposition. A deposition is a record of the sworn testimony of a witness taken before an authorized person. All parties and their attorneys had the right to be present and to examine and cross-examine the witness at the time the deposition was taken. The testimony given at that time is entitled to the same consideration you would give it if it had been presented to you by the witness in court today.

Given:_____
District Judge

Comment: This instruction should be given at the time the deposition is presented.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

During the course of the trial you have heard reference made to the word "interrogatory". An interrogatory is a written question asked by one party of another, who must answer it under oath in writing. You are to consider interrogatories and the answers thereto the same as if the questions had been asked and answered here in court.

GIVEN: _____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 1.09 General - Interrogatories

INSTRUCTION NO. _____

A court may take "judicial notice" of some facts and if it does, no evidence is required to prove them. In this case, the court has taken judicial notice of the fact that:

Given:_____
District Judge

Source: Mont. R. Evid. 201

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 1.10 General - Judicial Notice (Agreed Facts)

INSTRUCTION NO. _____

The court has concluded that it will be helpful to you to view the scene. We will now go there with the bailiffs in the vehicles provided. While you are there do not ask any questions of the lawyers or of the people who may be there. The reason for going there is simply to assist you in understanding and applying the testimony you have heard and the exhibits which have been introduced.

Given:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 1.11 General – View Authorized

INSTRUCTION NO._____

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation may give his/her opinion as an expert as to any matter in which he/she is skilled. In determining the weight to be given such opinion you should consider the qualifications and credibility of the expert and the reasons given for his/her opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 1.12 General - Expert Testimony

MPI2d 1.13 THROUGH 1.19 RESERVED

INSTRUCTION NO. _____

You should take the law in this case from my instructions alone. You should not accept anyone else's version as to what the law is in this case. You should not decide this case contrary to these instructions, even though you might believe the law ought to be otherwise. Counsel, however, may comment and argue to the jury upon the law as given in these instructions. If, in these instructions, any rules, direction or idea is stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. You are not to single out any sentence or any individual point or instruction, and ignore the others. You are to consider all of the instructions as a whole, and are to regard each in the light of all the others. The order in which the instructions are given has no significance as to their relative importance.

Given:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 1.20 General - Initial Closing Instruction

INSTRUCTION NO._____

This case will be submitted to you for your decision after you have heard the closing arguments of counsel. Upon retiring to the jury room, you shall select one of your number to preside over your deliberation and to sign the verdict. This being a civil lawsuit, two-thirds of the total number of jurors may return a verdict. Therefore, when eight or more of you agree on a verdict, you will have it signed by your representative and notify the bailiff, who will return you to the courtroom to present it.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 1.21 General - General Verdict

INSTRUCTION NO._____

This case will be submitted to you for your decision after you have heard the closing arguments of counsel. Upon retiring to the jury room, you shall select one of your number to preside over your deliberation and to sign the verdict to which you agree. This being a civil lawsuit, two-thirds of the total number of jurors may return a verdict.

It is your duty to return the verdict on the form submitted to you, completing the form in the manner indicated and having it signed by your presiding member. At least eight jurors must agree on the answer to each question submitted. It is not necessary that the same jurors agree on each separate question.

When you have reached your verdict and completed and signed the verdict form, you will notify the bailiff, who will return you into court.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 1.22 General - Special Verdict

INSTRUCTION NO._____

Your attitude and conduct at the beginning of your deliberation is very important. At that time it is usually not helpful for any juror to announce a strong opinion or take a stand for a particular verdict. Such a juror may be unwilling or embarrassed to change such an opinion or stand, even if his or her error becomes clear.

You have a duty to consult with one another and to deliberate with a view to reaching agreement if it can be done without violence to your individual judgment. This requires that you fully and fairly discuss among yourselves all of the evidence and the law. You have a right to re-examine your own views and change your opinion if you are convinced to do so by fair and honest discussion. But you should not surrender your honest conviction because a majority of the jury feels otherwise, or for the sole purpose of returning a verdict or preventing a mistrial.

To render the quality of justice that you would hope for if you were a party to this or any other litigation, you must weigh and consider this case without sympathy, passion or prejudice for or against any party or person.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 1.23 General - Jury Conduct

INSTRUCTION NO._____

During your deliberations, you may communicate with the Court by sending a note through the bailiff. The note must be signed and can be submitted by any member of the jury. No juror should attempt to communicate with the Court by means other than a written and signed note. The Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing or orally in open court.

You will note from the oath taken by the bailiff that he/she, too, is forbidden to communicate with any member of the jury on any subject touching the merits of the case.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 1.24 General - Jury Communication with Court

INSTRUCTION NO._____

During the course of this trial you have been admonished not to discuss this case among yourselves or with anyone else. Your verdict having been received, you are now free to discuss anything connected with this trial, including your deliberations, with anyone you choose. You are not, however, bound or required to discuss these matters with anyone. You are entitled to refrain entirely from any such discussion, and if any attempt is made to force you, by word or deed, to talk about these matters you may call upon the Court to enforce your right to refuse to talk about them.

Given:_____
District Judge

Comment: To be given upon release of jury.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 1.25 General - Release of Jury

Montana Pattern Instructions
January, 2003 Edition

MPI 2d

Chapter 2 - Negligence

INSTRUCTION NO. _____

Every person is responsible for injury to the person [or property] of another, caused by his/her negligence.

Negligence is the failure to use reasonable care. Negligence may consist of action or inaction. A person is negligent if he/she fails to act as an ordinarily prudent person would act under the circumstances.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 2.00 Negligence - Defined

INSTRUCTION NO. _____

A child is negligent if he/she fails to use that degree of care which is ordinarily exercised by children of the same age, intelligence, knowledge and experience under the circumstances then existing.

GIVEN:_____
District Judge

Comment: The Commission feels that there is no need to state that a driver must anticipate that children do not exercise the same degree of care for their own safety as adults. This is included in the definition of negligence.

Whether the Court reads a statute which may have been violated by a child depends upon whether it was keyed to children. The statute should not be read if the Court decides that the statute does not apply to children.

There may be circumstances where this instruction is not applicable. See *Cooper v. Rosston*, 1988, 232 Mont. 186, 756 P.2d 1125.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

By law, a child under the age of 7 years is incapable of contributory negligence.

GIVEN:_____
District Judge

Source: *Burns v. Eminger*, 81 Mont. 79, 261 P. 613 (1927)

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

A legal doctrine called "res ipsa loquitur" is involved in this case. The meaning of the term is, "it speaks for itself." Under this doctrine, even though negligence has not been proven by other evidence, you may infer negligence from the circumstances surrounding an event if you find from a preponderance of the evidence that: (1) the event is of a kind which ordinarily does not occur in the absence of negligence; (2) other causes, including the conduct of the plaintiff and other persons, have been sufficiently eliminated by the evidence.

GIVEN:_____
District Judge

Source: *Tompkins v. Northwestern Union Trust*, 198 Mont. 170, 176, 645 P.2d 402, 406 (1982) (quoting Restatement (Second) of Torts, Section 328D (1965)), *cited with approval in Brothers v. General Motors*, (1983), 202 Mont. 477, 482, 658 P.2d 1108, 1110, (products liability); *see also* sections 26-1-501 and -502, MCA (inference defined).

Comment: Before giving this instruction, the court must determine whether the negligence claimed is within the scope of the defendant's duty to the plaintiff.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 2.03 Negligence - Res Ipsa Loquitur

INSTRUCTION NO. _____

Every person has a right to assume that every other person will act with reasonable care. In the absence of a reason to think otherwise, it is not negligent for a person to fail to anticipate an injury which can result only from another's violation of the law or failure to use reasonable care.

GIVEN:_____
District Judge

Comment: Before using this instruction, see *Sizemore v. Montana Power Co.*, (1990), 246 Mont. 37, 803 P.2d 629.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 2.04 Negligence - Assumption Law Is Obeyed

INSTRUCTION NO._____

Negligence on the part of the plaintiff does not bar his/her recovery unless such negligence was greater than the negligence of the defendant. However, the total amount of damages that plaintiff would otherwise be entitled to recover will be reduced by the court in proportion to the amount of negligence you attribute to the plaintiff.

GIVEN:_____
District Judge

Source: Section 27-1-702, MCA. *Smith v. Rorvick*, (1988), 231 Mont. 85, 751 P.2d 1053.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 2.05 Negligence - Contributory Negligence

INSTRUCTION NO. _____

Negligence on the part of the plaintiff does not bar his/her recovery unless his/her negligence was greater than the combined negligence of the defendants. However, the total amount of damages that plaintiff would otherwise be entitled to recover will be reduced by the court in proportion to the amount of negligence you attribute to the plaintiff.

GIVEN:_____
District Judge

Source: *North v. Bunday*, (1987), 226 Mont. 247, 735 P.2d 270; *Smith v. Rorvick*, (1988), 231 Mont. 85, 751 P.2d 1053.

Comments: This instruction should be used as an alternative to MPI2d 2.05 where there is more than one defendant.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 2.06 Negligence - Contributory Negligence (Multiple Defendants)

INSTRUCTION NO. _____

The defendant is liable if his/her negligence was a cause of plaintiff's (injury/death/damage).

The defendant's conduct is a cause of the (injury/death/damage) if it helped produce it and if the (injury/death/damage) would not have occurred without it.

Given:_____
District Judge

NOTE: The "single-cause" (MPI2d 2.07) and "multiple cause" (MPI2d 2.08) instructions are mutually exclusive alternatives. One or the other may be given, but not both. For cases where chain of causation is in issue, see MPI2d 2.09.

Source: *Busta v. Columbus Hospital*, (1996), 276 Mont. 342, 916 P.2d 122

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____ R____ W____

MPI2d 2.07 Negligence - Causation (Single Cause)

INSTRUCTION NO. _____

The defendant is liable if his/her negligence was a cause of plaintiff's (injury/death/damage).

The defendant's conduct is a cause of the plaintiff's (injury/death/damage) if it is a substantial factor in bringing it about.

Given:_____
District Judge

NOTE: The "single cause" (MPI2d 2.07) and "multiple cause" (MPI2d 2.08) instructions are mutually exclusive alternatives. One or the other may be given, but not both. For cases where chain of causation is in issue, see MPI2d 2.09.

Comment: In *Busta v. Columbus Hospital*, (1996), 276 Mont. 342, 916 P.2d 122 the Supreme Court held: "In those cases where there are allegations that the acts of more than one person combined to produce a result (e.g., when the plaintiff alleges negligence and the defendant alleges contributory negligence, or when there are multiple defendants), we acknowledge that the recommended cause-in-fact instruction [MPI2d 2.07] would be confusing and misleading." (Bracketed material added by MPI Commission.) For examples of particular fact settings in which the substantial factor instruction has been applied, see *Rudek v. Wright*, (1988), 218 Mont. 41, 709 P.2d 621 and *Kyriss v. State*, (1985), 218 Mont. 162, 707 P.2d 5.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____ R____ W____

INSTRUCTION NO. _____

The defendant is liable if his/her negligence was a cause of plaintiff's (injury/death/damage).

The defendant's conduct is a cause of the (injury/death/damage) if, in a natural and continuous sequence, [it helped produce it and if the (injury/death/damage) would not have occurred without it] [it is a substantial factor in bringing it about].

Given:_____
District Judge

NOTE: The bracketed portions are mutually exclusive alternatives. One or the other may be given, but not both.

Comment: In those cases where the chain of causation is in issue (e.g., where there is an allegation of an independent intervening cause), the Supreme Court opinion in *Busta v. Columbus Hospital*, (1996), 276 Mont. 342, 916 P.2d 122, recommends modifying causation instructions as indicated in this instruction. In such cases, Court and counsel should draft additional instructions by reference to *Sizemore v. Montana Power Co.*, (1990), 246 Mont. 37, 803 P.2d 629, and *Restatement of Torts, Second*, Sections 440 through 452.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____ R____ W____

INSTRUCTION NO._____

More than one person may be liable for causing an injury. A defendant may not avoid liability by claiming that some other person [whether or not named as a defendant in this action] helped cause the injury.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 2.10 Negligence - Multiple Causation

INSTRUCTION NO._____

If you find for the plaintiff, then the defendant is liable to the plaintiff for the results of medical treatment [even where such treatment is itself negligent,] so long as the plaintiff exercised reasonable care in his/her selection of a physician.

GIVEN:_____
District Judge

Source: *Callihan v. Burlington Northern*, 201 Mont. 350, 357-58, 654 P.2d 972, 976 (1982) (citing Restatement (Second) of Torts section 457 comment a (1965)).

Comment: Use in cases where plaintiff's condition might have been worsened by medical treatment, whether negligent or bad result.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

In a civil case, such as this one, the party that makes a claim must prove that claim by the greater weight of the evidence, sometimes referred to as the preponderance of the evidence. This is called the burden of proof.

A party who has the burden of proof must persuade you by the evidence that his/her claim is more probably true than not true. In other words, the evidence supporting the propositions which a party has the burden of proving, must outweigh the evidence opposed to it. In determining whether a party has met this burden, you will consider all the evidence, whether produced by the plaintiff or defendant.

GIVEN:_____
District Judge

Comment: This instruction is the same as MPI2d 1.03. It is recommended to be given both during the opening instructions and also as part of the final instructions.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 2.12 Negligence - Burden of Proof Defined

INSTRUCTION NO. _____

The plaintiff has the burden of proving:

(1) That the defendant was negligent.

(2) That the plaintiff was injured [and plaintiff's property was damaged.]

(3) That the defendant's negligence was a cause of the injury to the plaintiff [and the damage to plaintiff's property.]

(4) The amount of money that will compensate the plaintiff for his/her injury [and the damage to his/her property.]

GIVEN:_____
District Judge

Comment: The Commission expresses no opinion as to whether this instruction and MPI2d 2.12 should be given in addition to MPI2d 1.03.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 2.13 Negligence - Plaintiff's Burden of Proof

INSTRUCTION NO. _____

The defendant has the burden of proving that the plaintiff was negligent. As to this defense, the defendant has the burden of proving the following:

(1) That the plaintiff was negligent.

(2) That plaintiff's negligence was a cause of plaintiff's injury [and the damage to his/her property.]

GIVEN:_____
District Judge

Comment: The Commission expresses no opinion as to whether this instruction and MPI2d 2.12 should be given in addition to MPI2d 1.03.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 2.14 Negligence - Defendant's Burden of Proof

INSTRUCTION NO. _____

If you find that [any party to this suit] [the defendant] violated any of the following laws, then [that party] [the defendant] is negligent. You should then determine whether that negligence was a cause of the plaintiff's injury.

[Quote or paraphrase the statute]

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 2.15 Negligence - Violation of Law

INSTRUCTION NO. _____

Plaintiff claims negligent misrepresentation. To establish this claim, plaintiff must prove:

(1) defendant made a representation as to a material fact;

(2) the representation was untrue;

(3) regardless of his/her actual belief, the defendant made the representation without any reasonable ground for believing it to be true;

(4) the representation was made with the intent to induce plaintiff to rely upon it;

(5) plaintiff was unaware of the falsity of the representation and was justified in relying on it;

(6) as a result of the reliance, plaintiff sustained damage.

GIVEN:_____
District Judge

Source: *Cechovic v. Hardin & Associates, Inc.*, (1995), 273 Mont. 104, 902 P.2d 520; *Barrett v. Holland & Hart*, (1992), 256 Mont. 101, 845 P.2d 714.

Comment: If less than all elements are at issue, instruct only on those at issue.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 2.16 Negligent Misrepresentation

Montana Pattern Instructions
January, 2003 Edition

MPI 2d

Chapter 3 – Professional Negligence

INSTRUCTION NO._____

In performing professional services for a patient, a doctor has the duty to use that degree of learning and skill ordinarily used by doctors practicing in that field of medicine in the same or a similar community in the United States and under similar circumstances.

A failure to perform this duty is negligence.

GIVEN:_____
District Judge

Comment: This instruction should only be given in cases where the defendant is a non-board certified physician. See: *Aasheim v. Humberger*, 695 P.2d 824, 42 St. Rep. 235, 237 (1985); *Tall Bull v. Whitney*, 172 Mont. 326, 564 P. 2d 162 (1977); *Chapel v. Allison*, 241 Mont. 83, 92-93, 785 P.2d 204 (1990) and *Falcon v. Allison*, 57 Mont. 296, 848 p.2d 1050 (1993). This applies only to treatments by such physicians after 3/31/90.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____ R_____ W____

MPI2d 3.00 Professional Negligence - Duty of Doctor (Not Board Certified).

INSTRUCTION NO._____

It is the duty of a board certified doctor to use that skill and learning ordinarily used in like cases by other doctors in good standing practicing in that same specialty and who hold the same national board certification.

The violation of this duty is negligence.

GIVEN:_____
District Judge

Comments: To be used in cases where defendant is a board certified physician. See *Webb v. T.D., D.C. R.K.S., M.D. and C.H.A., M.D*, 287 Mont. 68, 951 P.2d 1008 (1997); *Glover v. Ballhagen*, 232 Mont. 427, 756 P.2d 1166 (1988); and *Aasheim v. Humberger*, 695 P. 2d 824, 826-27, 42 St. Rep. 235, 238 (1985).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 3.01 Professional Negligence - General Duty of Board Certified Doctor

INSTRUCTION NO._____

It is the duty of a doctor practicing as a specialist to use the care and skill ordinarily used by qualified specialists practicing in the same field and in the same or similar community in the United States and under similar circumstances.

A failure to perform such duty is negligence.

GIVEN:_____
District Judge

Comments: See *Chapel v. Allison*, 241 Mont. 83, 92-93, 785 P.2d 204 (1990) and *Burlingham v. Mintz*, (1995), 270 Mont. 277, 891 P.2d 527 (1995).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 3.02 Professional Negligence - Duty of Specialist (Not Board Certified)

INSTRUCTION NO._____

A doctor who performs professional services which should be performed by a specialist has a duty to use the care and skill of a specialist in that field of medicine.

A failure to perform any such duty is negligence.

GIVEN: _____
District Judge

Comment: This instruction may be adapted to a legal negligence case.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 3.03 Professional Negligence - Duty When Providing Specialized Care

INSTRUCTION NO._____

It is the duty of a doctor to obtain a patient's consent before treatment.

To obtain consent a doctor is required to disclose all material facts relating to the proposed treatment so that the necessary consent to treatment can be based on an intelligent exercise of judgment. He/she must explain, in terms a layperson can understand, the nature of any significant risks that may be encountered as a result of the treatment. Treatment without consent renders the doctor liable for any injury which resulted from the treatment.

GIVEN: _____
District Judge

Source: *Collins v. Itoh*, 160 Mont. 461, 467-68, 503 P.2d 36, 40 (1972)

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

If you find from expert medical evidence that a standard of practice existed among doctors as to the amount of information which a doctor would disclose to a patient such as plaintiff under the circumstances of this case, and if you also find from your evaluation of all the evidence that the doctor failed to disclose to plaintiff the information required by such standard, then the consent obtained from plaintiff was not an informed consent.

GIVEN: _____
District Judge

Source: *Neggard v. Estate of Feda*, 152 Mont. 47, 55, 446 P.2d 436, 441 (1968) See Also: *Collins v. Itoh*, 160 Mont. 461, 503 p. 2d 36 (1972).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 3.05 Professional Negligence - Informed Consent Standard

INSTRUCTION NO._____

The testimony of an expert is ordinarily required to establish the appropriate standard of care owed by a doctor to his/her patient. However the law permits an exception where you, as lay persons, are able to say as a matter of common knowledge and observation that it is plain and obvious that the injury the patient has established could not have been sustained if due care had been exercised.

GIVEN: _____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 3.06 Professional Negligence - Expert Testimony (When Not Required)

INSTRUCTION NO._____

In determining whether the doctor was negligent in performing professional services the proper test is whether the doctor's performance met the accepted standards of skill and care at the time the services were provided.

GIVEN: _____
District Judge

Comment: This instruction should be used only in cases where there is an issue regarding the state of medical knowledge at the time in question.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 3.07 Professional Negligence - Medical Knowledge At Time of Treatment

INSTRUCTION NO._____

A doctor's negligence is a cause of damage to the plaintiff if it increases risk of harm to the plaintiff or reduces the plaintiff’s chance for obtaining a better result.

GIVEN: _____
District Judge

Source: See *Aasheim v. Humberger*, 695 P.2d 824, 827-28, 42 St. Rep. 235, 238-40 (1985)

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

(It is the duty of a hospital to use reasonable care in furnishing a patient the care, attention and protection reasonably required by his/her mental and physical condition.)

(It is (also) the duty of a hospital to use reasonable care in (selecting a competent medical staff) (periodically reviewing the competency of its medical staff).)

The standard of reasonable care required of a hospital is the care used under similar circumstances by a reasonably competent hospital providing similar services.

A failure to perform any such duty is negligence.

GIVEN: _____
District Judge

Comment: Use parenthetical material as appropriate. The requirement of periodic review has not been addressed by the Montana Supreme Court.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

In performing professional services for a patient, a nurse has the duty to use the care and skill ordinarily used in like cases by nurses practicing in that profession in the same or a similar locality under similar circumstances.

A failure to perform any such duty is negligence.

GIVEN: _____
District Judge

Source: See *Aasheim v. Humberger*, (1985), 695 P.2d 824, 826, 42 St. Rep. 235, 237-238 (1985). See Also: *Glover v. Ballhagen*, 232 Mont. 427, 428, 756 P.2d 1166, 1167 (1988). Cf. *Tall Bull v. Whitney*, 172 Mont. 326, 564 P.2d 162 (1977).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

A physician who is hired by a third party to conduct a medical examination has the duty to exercise ordinary care to discover those medical conditions which pose an imminent danger to the person's physical or mental well-being and to comply with the applicable standard of care when communicating the results of the examination to that person.

GIVEN: _____
District Judge

Comment: This is not intended as an exclusive or comprehensive statement of a physician's duty to a non-patient.

Source: *Webb v. T.D.,* 287 Mont. 68, 77; 951 P.2d 1008 (1997)

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 3.11 Professional Negligence – Duty of Physician to Non-Patient

INSTRUCTION NO._____

In performing professional services for a client, a lawyer has the duty to have that degree of learning and skill ordinarily possessed by lawyers practicing in Montana.

A failure to perform any such duty is negligence.

GIVEN: _____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 3.20 Professional Negligence - Duty of a Lawyer

Montana Pattern Instructions
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MPI 2d

Chapter 4 - Employment

INSTRUCTION NO._____

It is wrongful for an employer to discharge an employee if:

[Insert appropriate provision from §39-2-904, MCA]

GIVEN: _____
District Judge

Source: §39-2-904, MCA.

Comment: This instruction does not apply in those situations excepted by §39-2-912, MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 4.00 Employment - Wrongful Discharge – (§39-2-901, et seq., MCA).

INSTRUCTION NO._____

Discharge is any termination of employment, including: [resignation] [elimination of the job] [layoff for lack of work] [failure to recall or rehire] [any cutback in the number of employees] [constructive discharge].

GIVEN: _____
District Judge

Source: §39-2-903(2), MCA.

Comment: Limit to appropriate case specific language from §39-2-903(1) & (2), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

Constructive discharge is the voluntary termination of employment by an employee because of a situation created by an employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. [The employer's refusal to promote the employee or improve wages, responsibilities or other terms and conditions of the employment do not constitute constructive discharge.]

GIVEN: _____
District Judge

Source: §39-2-903(1), MCA.

Comment: Use bracketed language when appropriate.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 4.02 Employment – Constructive Discharge (Definition)

INSTRUCTION NO._____

Whether an employee has been discharged is not dependent upon the use of any particular words. Discharge occurs when the employer's words or actions would lead a reasonable person to believe he or she has been discharged.

GIVEN: _____
District Judge

Source: *Hannifan v. Retail Clerks International Association*, 162 Mont. 170, 178, 511 P.2d 982, 987 (1973).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 4.03 Employment – Dispute as to Discharge

INSTRUCTION NO._____

Public policy means a policy, established by constitutional provision, statute or administrative rule, in effect at the time of the discharge concerning the public health, safety or welfare. The public policy claimed to be violated in this case is:

[Insert the appropriate constitutional provision, statute or administrative rule].

GIVEN: _____
District Judge

Source: §39-2-903(7), MCA.

Comment: For nature of proof, see *Motarie v. Northern Montana Joint Refuse Disposal District*, 274 Mont. 239, 907 P.2d 154 (1995); *Krebs v. Ryan Oldsmobile*, 255 Mont. 291, 843 P.2d 312 (1992).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

Good cause means reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation or other legitimate business reason.

GIVEN:_____
District Judge

Source: §39-2-903(5), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 4.05 Employment – Good Cause (Definition)

INSTRUCTION NO._____

A legitimate business reason for discharge is one which is logically related to the needs of the business and which is not false, arbitrary or capricious.

GIVEN: _____
District Judge

Source: *Braulick v. Hathaway Meats, Inc.*, 294 Mont. 1, 980 P.2d 1 (1999); *Buck v. Billings Montana Chevrolet, Inc.*, 248 Mont. 276, 811 P.2d 537, 540 (1991).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 4.06 Employment – Legitimate Business Purpose (Definition)

INSTRUCTION NO._____

If you determine that the Plaintiff was wrongfully discharged, the Plaintiff is entitled to lost wages and fringe benefits. You may award lost wages and fringe benefits, together with interest, for a period not to exceed four (4) years from the date of discharge.

GIVEN: _____
District Judge

Source: §39-2-905(1), MCA; *Weber v. State*, 253 Mont. 148, 831 P.2d 1359 (1992).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 4.07 Employment - Damages

INSTRUCTION NO._____

Any amounts the Plaintiff earned or, with reasonable diligence, could have earned during the period for which the award is made must be deducted from the amount awarded. Before any earnings are deducted from your award, you must first subtract any amounts reasonably expended in searching for, obtaining and relocating to new employment.

GIVEN: _____
District Judge

Source: §39-2-905(1), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 4.08 Employment – Damages (Mitigation)

INSTRUCTION NO._____

For purposes of determining damages, lost wages mean the gross amount of wages that would have been reported to the Internal Revenue Service on Form W-2 and includes additional compensation deferred at the option of the employee. Fringe benefits mean the value of any employer-paid vacation leave, sick leave, medical insurance plan and pension benefit plan in force on the date of the discharge.

GIVEN: _____
District Judge

Source: §39-2-903(4) &(6), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 4.09 Employment – Damages (Lost Wages and Benefits - Definition)

INSTRUCTION NO._____

Punitive damages may be awarded to punish a defendant and to deter others from engaging in unlawful conduct, if you determine by clear and convincing evidence that the employer acted with fraud or malice in the discharge of the employee in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy.

GIVEN: _____
District Judge

Source: §39-2-905(2), MCA.

Comment: See *Motarie v. Northern Montana Joint Refuse Disposal District*, 274 Mont. 239, 907 P.2d 154 (1995); *Krebs v. Ryan Oldsmobile*, 255 Mont. 291, 843 P.2d 312 (1992).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 4.10 Employment – Punitive Damages

INSTRUCTION NO._____

It is an unlawful discriminatory practice for a person [educational institution] [financial institution] [governmental entity or agency] to:

[Insert particular language from Title 49, Parts 2 or 3, MCA]

GIVEN: _____
District Judge

NOTE: In addition to inserting the appropriate statutory language for the discrimination alleged, the exceptions contained in Parts 3 and 4 of Title 49, to extent applicable, should form the basis for additional case-specific instructions.

Source: §49-2-301 & 302, MCA.

Proposed by P(#____), D(#____), Ct(____)

Disposition G____R____W____

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Chapter 5 - Condemnation

INSTRUCTION NO._____

This action is one for condemnation, sometimes referred to as eminent domain. When permitted by Montana law, plaintiff may take property belonging to the defendant to be used for authorized purposes.

I have already determined that the law authorizes plaintiff to take defendant's property. You will not concern yourselves with that issue. Your only duty is to set the amount of just compensation to be paid to defendant for the property actually taken [and for depreciation, if any, of the property not taken].

The defendant has the burden of proving the amount of just compensation to which he/she is entitled.

GIVEN:_____
District Judge

Source: See sections 70-1-205 and 70-30-101 to -111, MCA; see also *State v. Marsh*, 165 Mont. 198, 202, 527 P.2d 573, 575 (1974).

Comment: It is recommended that this instruction be given at the beginning of the trial.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

The defendant is entitled to just compensation determined as of _____(date). Just compensation includes:

(a) the fair market value of the property actually taken

(b) [Insert additional elements as appropriate. See MPI2d 5.01A and B.]

GIVEN:_____
District Judge

NOTE: Date to be inserted is date of service of summons.

Source: See sections 70-30-302 to -306 and -313, MCA; see generally *Montana State Highway Commission v. Jacobs*, 150 Mont. 322, 435 P.2d 274 (1967).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

( ) Any depreciation to the fair market value of the property not actually taken.

GIVEN:_____
District Judge

Source: Section 70-30-302(1), MCA.

Comment: See MPI2d 5.04.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

( ) The fair market value of [machinery or equipment] that cannot be removed from the land without substantial economic loss or without substantial physical damage to the property in which it is installed.

GIVEN:_____
District Judge

Comment: (1) See MPI2d 5.04. (2) As to removal of personal property items, see 60-4-301 et. seq. and 70-31-101 et. seq., MCA.

Source: See section 70-30-302(1).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 5.03 Condemnation - Just Compensation Elements (Fixtures)

INSTRUCTION NO._____

Where, as here, the property being taken is only a part of a larger parcel belonging to the same owner, the owner is entitled to recover any depreciation in fair market value which will occur to the part not taken by reason of its severance from the part actually taken and the construction of the improvements in the manner proposed by the plaintiff.

Depreciation is the difference between the fair market value of the remaining property before the taking and the fair market value of the remaining property after the taking.

You must presume that the improvement put upon the land taken will conform to the plans and diagrams shown to you, and you must once and for all, fix the depreciation, present and future, that will result reasonably from the construction and presence of the improvement.

GIVEN:_____
District Judge

Source: See section 70-30-302(1), MCA; see also *Meagher County Newlan Creek Water District v. Walter*, 169 Mont. 358, 362-63, 366-67, 547 P.2d 850, 853, 855 (1976); cf. *Lewis & Clark County v. Nett*, (1928), 81 Mont. 261, 269, 263 P. 418, 421, (1928), has been further discussed in *State v. Heltborg*, 369 P.2d 521, 523, 140 Mont. 196, 200 (1962).

Comment: To be given when MPI2d 5.02 is given.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

Permanent interference with the use and enjoyment of the land may be considered by you in determining whether the fair market value of the remaining property is depreciated by the taking. Temporary interference or inconvenience is not to be considered.

Circuity of travel and inconvenience have no value separate from the value of the land. Only permanent and substantial interference caused by circuity of travel and inconvenience may be considered by you in determining whether the fair market value of the remaining property is reduced by the taking.

GIVEN:_____
District Judge

Source: See *State v. Donnes*, 187 Mont. 338, 341-42, 609 P.2d 1213, 1215 (1980); see also *County of McCone v. James*, 198 Mont. 430, 434, 646 P.2d 1209, 1211 (1982).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

In determining whether particular machinery or equipment can be removed without a substantial economic loss, consider its fair market value in place compared to its fair market value if it were removed and sold.

GIVEN:_____
District Judge

Comment: To be used if MPI2d 5.03 is used.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

To determine just compensation due a lessee you must determine the fair market value of the lease. You may take into consideration the length of the lease and the profitability of the lessee's operation at that location. In determining the profitability, you may consider such factors as the rent to be paid, the cost or expense of operation of the business and its revenues, the advantages and disadvantages of operating the business in that location, and the fact that the lessee is relieved of such additional expense.

GIVEN:_____
District Judge

Source: See *State v. Schumacher*, 180 Mont. 329, 335, 590 P.2d 1110, 1114-15 (1979) (quoting *State v. Crow*, 142 Mont. 270, 276-77, 384 P.2d 273, 276-77 (1963).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

The fair market value of the property is to be based upon its availability for the most valuable purpose for which it can be used, whether it is being used for such purpose or not. However to be available for such a use, the landowner must prove that the property being taken was marketable at the time that it was taken for that use.

You may consider uses that are most advantageous with reference to present and future conditions in the community at the date of valuation. Speculative uses, remote and conjectural possibilities are not to be considered.

GIVEN:_____
District Judge

Source: See section 70-30-313, MCA; see also *State v. Antonioli*, 145 Mont. 411, 417, 419, 401 P.2d 563, 566-67 (1965).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

Fair market value is the price that would be agreed to by a willing and informed seller and buyer, neither acting of necessity.

GIVEN:_____
District Judge

Source: See section 70-30-313, MCA; see also *State v. Metcalf*, 160 Mont. 164, 173, 500 P.2d 951, 955 (1972); cf. *State v. Schumacher*, 180 Mont. 329, 334-35, 590 P.2d 1110, 1114 (1979) (property of a type seldom exchanged).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

Loss of business or profits from a business conducted on the property being taken may be considered as evidence related to the fair market value of the defendant's property. You may not, however, separately award compensation for loss of business or profits as such.

GIVEN:_____
District Judge

Source: See *State v. Keneally*, 142 Mont. 256, 266, 384 P.2d 770, 775-76 (1963).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 5.10 Condemnation - Lost Profits

INSTRUCTION NO._____

The plaintiff seeks to acquire an easement in [a portion of the] land owned by the defendant. The term "easement" means a right to use the land of another for specific purposes. The defendant will retain the right to use this land in which the easement is sought for any purposes which are not inconsistent with the construction and maintenance of the planned improvement.

If the parcel of land in which the easement is sought will still have some market value after the taking of the easement and the construction of the improvement in the manner proposed, the plaintiff is not required to pay the full market value of said parcel, but is required to pay only the decrease in market value that results from the easement.

Thus, in determining the compensation to be awarded for the taking of the easement, you must first determine the fair market value of the parcel of land in which the easement is sought and then determine the value of the same parcel of land as it will be when it is subject to the easement and the construction of the improvement in the manner proposed. The difference between these amounts will represent the value of the easement sought to be acquired.

GIVEN:_____
District Judge

Source: See section 70-30-104(3) and -302(1), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

You are not bound to accept the opinion of any witness as to the fair market value or use of the property, but you must determine the facts for yourselves. It is your duty to weigh the testimony of each witness who has expressed such opinions. The testimony should be considered with reference to all the circumstances surrounding not only the value and use of the property itself, but also the witness' familiarity with such property. You are to determine from all such circumstances how well qualified the witness may be to express a true opinion of use and fair market value of the property.

GIVEN:_____
District Judge

Source: See *State v. Donnes*, 187 Mont. 338, 340, 609 P.2d 1213, 1214-15 (1980). *State v. Peterson*, 134 Mont. 52, 63, 328 P.2d 617, 623 (1958), has been further discussed in *State By and Through Dept. of Highways v. Schumacher*, , 590 P.2d 1110, 1115, 180 Mont. 329, 336 (1979). Rule restated in *Alexander v. State*, 142 Mont. 93, 103, 381 P.2d 780, 785 (1963)

Comment: It is recommended that this instruction be used in lieu of MPI2d 1.12, Expert Testimony.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

You may not award compensation in excess of $_____, which is the defendant's evidence of the highest total amount of loss; nor may your verdict be less than $_____, which is plaintiff's evidence of the lowest total amount of defendant's loss.

GIVEN:_____
District Judge

Source: See *State v. Barovich*, 142 Mont. 191, 193, 382 P.2d 917, 918 (1963).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

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Chapter 6 - FELA

INSTRUCTION NO. _____

In this case, plaintiff seeks to recover compensation under a law of the United States commonly called the Federal Employers Liability Act, sometimes called FELA. That act is the method for compensating employees of the railroad for on-the-job injury. Plaintiff is not entitled to any benefits under Montana's workers' compensation laws.

GIVEN:_____
District Judge

Comment: This instruction may be used in conjunction with MPI2d 1.00 or as part of the closing instructions.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 6.00 FELA - Exclusive Remedy

INSTRUCTION NO._____

In this case, plaintiff seeks to recover compensation under a law of the United States commonly called the Federal Employers Liability Act. That Act provides that:

Every railroad is liable for compensation to any employee who is injured on the job if the injury is caused in whole or in part from the negligence of the railroad or its employees.

GIVEN:_____
District Judge

Source: See 45 U.S.C. §52 (1986). Also note, amendments pending.

Comment: This instruction should be given where it is conceded that at the time and place alleged in the complaint, the defendant was a common carrier by railroad engaged in interstate commerce; the plaintiff was then an employee of the defendant engaged in such commerce; and the plaintiff's right, if any, to recover in this case is governed by the provisions of the Federal Employers Liability Act.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

Comment: See MPI 2.00

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

If the railroad was negligent, and its negligence was a cause of injury to [the death of] an employee, it is liable for compensation even though its negligence was not the sole cause of the injury [death] and even though the negligence of a person other than the employee or the railroad may have contributed to any degree to the cause of the injury [death].

GIVEN:_____
District Judge

Source: See BAJI No. 11.16 (7th Ed. 1986); see also *Lewis v. Union Pac. R.Co.*, 127 Cal.App.2d 280, 284, 273 P.2d 706, 709 (1954).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

It was the duty of the employee [the decedent] to exercise ordinary care for his/her own safety.

If the employee was negligent, and if his/her negligence was the only cause of his/her injury, then he/she may not recover.

If the injury was caused by the negligence of both the employee and the railroad, the total recovery will be reduced in proportion to the percentage of his/her own negligence.

GIVEN:_____
District Judge

Source: See 45 U.S.C. Sec. 53 (1982); BAJI No. 11.18 (7th Ed. 1986); see also, *Atlantic Coastline R. Co. v. Dixon*, 189 F.2d 525, 527 (5th Cir.), *cert. denied*, 342 U.S. 830 (1951)

Proposed by P(#____), D(#____), Ct(#____)

Disposition G__ R__ W__

INSTRUCTION NO._____

For purposes of this case, an act or a failure to act is the cause of an injury if it plays a part, no matter how small, in bringing about the injury.

GIVEN:_____
District Judge

Source: See *Rogers v. Missouri River R.Co.*, 352 U.S. 500, 506-07 (1957); 45 U.S.C. §52 (1986); see also BAJI No. 11.14 (7th Ed. 1986). *Further treatment:* see also *Marazzato v. Burlington Northern R. Co.*, (1991), 249 Mont. 487, 491, 817 P.2d 672, 674.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

In this case, plaintiff seeks to recover compensation under a law of the United States commonly called the Federal Safety Appliance Act. That law provides that every railroad is liable for compensation to any employee who is injured on the job if the railroad violates any such law and if the injury is caused in whole or in part from such violation.

It also provides that such liability shall exist whether or not the railroad exercised reasonable care to comply with the law or to maintain its equipment, and whether or not the employee who was injured was negligent.

GIVEN:_____
District Judge

Source: See *Lilly v. Grand Trunk W. R. Co.,* 317 U.S. 481, 485-86 (1943); 45 U.S.C. §52 (1986); see also BAJI Nos. 11.31 & 11.32 (7th ed. 1986). Further treatment: see also, *Anderson v. Burlington Northern, Inc.*, (1985), 218 Mont. 456, 460, 709 P.2d 641, 644.

Comment: Substitute Boiler Inspection Act where appropriate.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

The Federal Safety Appliance Act imposes upon a railroad an absolute duty to equip its cars with efficient brakes and to maintain those brakes in an efficient, operating condition.

To be efficient, the hand brake must be capable of operation and kept in such condition that shall, at all times, be operative. The test of compliance with the law is whether the brake was effective in operation and able to produce an efficient result when properly applied. If it was, then it was efficient within the requirements of the law.

GIVEN:_____
District Judge

Source: See 45 U.S.C. §11 (1982) **REPEALED: §§1 TO 43A REPEALED.**Pub.L. 103-272,§7(b), July 5, 1994, 108 Stat. 1379. *Southern Pac. Co. v. Carson*, 169 F.2d 734, 736-37 & n.5 (9th Cir. 1948); see also BAJI No. 11.34 (7th ed. 1986).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

To comply with the Federal Safety Appliance Act, a coupler must be one which, when operated in the manner intended, performs its functions in all the ordinary conditions under which couplings or uncouplings are made.

The duty of the defendant was to equip the car in question with a coupler, which, when operated in the manner intended, would work efficiently.

If you should find that the plaintiff [deceased] in the performance of his/her duties, attempted to operate the coupler in the intended manner, and the coupler, when so operated, failed to work efficiently, and it became necessary to go between the cars to operate the same, then you must find that the railroad violated the Safety Appliance Act.

GIVEN:_____
District Judge

Source: see 45 U.S.C. §2 (1982) **REPEALED: §§1 TO 43A REPEALED.** Pub.L. 103-272,§7(b), July 5, 1994, 108 Stat. 1379. *O'Donnell v. Elgin, Joliet & Eastern Ry.*, 338 U.S. 384, 389-22 (1949), reh'g denied, 338 U.S. 945 (1950); see also BAJI No. 11.35 (7th ed. 1986).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

If you find that a coupler broke under ordinary operational conditions of railroad work, then you must also find that the coupler was defective and that it was furnished and used in violation of the Safety Appliance Acts.

GIVEN:_____
District Judge

Source: BAJI No. 11.36 (7th ed. 1986).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 6.09 FELA - Broken Coupler

INSTRUCTION NO._____

The railroad has a duty to use ordinary care to provide employees with safe and suitable tools, machinery and appliances with which to do their work.

GIVEN:_____
District Judge

Source: See *Chicago & Northwestern Ry. v. Bower*, 241 U.S. 470, 473-74 (1916); *Carpentener v. Atchison, Topeka & Santa Fe Ry.*, 109 Cal. App. 2d 18, 240 P.2d 5, 8 (1952).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

Ordinarily, an employee is not required to make an inspection of the tools furnished him/her by his/her employer. In the absence of knowledge to the contrary and in the absence of circumstances that should lead him/her to believe to the contrary, an employee may assume that his/her employer has furnished him/her with safe tools and appliances with which to perform his/her work and may rely and act on that assumption.

However, it is the duty of the employee to use ordinary care to discover open and obvious defects which render his/her tools dangerous to use in the performance of his/her work.

GIVEN:_____
District Judge

Source: See *Chicago & Northwestern Ry. v. Bower*, 241 U.S. 470, 475-76 (1916); see also BAJI No. 11.11 (7th ed. 1986).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

The railroad is not required to furnish the latest, best and safest tools, machinery or appliances, or to discard standard tools, machinery or appliances upon the discovery of later developments. Neither is there any duty on the employer to anticipate the misuse of equipment by the plaintiff nor to guard against the consequences of such misuse.

GIVEN:_____
District Judge

Source: See *Chicago & Northwestern Ry. v. Bower*, 241 U.S. 470, 473-74 (1916).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

A railroad has a continuous duty to use ordinary care in furnishing its employees with a reasonably safe place to work. The amount of caution required by that duty varies according to the dangers known to be involved in the work.

In the absence of knowledge or notice to the contrary and in the absence of circumstances that should lead him/her to believe otherwise, a railroad employee may assume that his/her employer has exercised ordinary care in furnishing him/her a reasonably safe place to work and may act on that assumption.

[The duty to furnish a reasonably safe place to work is a nondelegable duty. "Nondelegable" as used in this instruction means that where, as in this case, there is a duty required of an employer to provide a reasonably safe place for its employees to work, the employer cannot relieve itself of that duty by transferring the responsibility to someone else.]

GIVEN:_____
District Judge

Source: *See Bailey v. Central Vermont Ry.*, 319 U.S. 350, 352-53 (1943); see also BAJI No. 11.10 (7th ed. 1986).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

Any award you make in this case will not be subject to income taxes, and you should not consider such taxes in fixing the amount of your award.

GIVEN:_____
District Judge

Source: BAJI No. 11.43.1 (7th ed. 1986); see also *Norfolk & W. Ry. Co. v. Liepelt*, (1980), 444 U.S. 490, 496-98. *Further treatment:* see also *Dallas v. Burlington Northern, Inc.*, (1984), 212 Mont. 514, 522, 689 P.2d 273, 277.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

PRODUCTS LIABILITY

PREFACE

The term "products liability" describes various rules of law under which one may seek compensation for damages resulting from harmful defective products. These rules of law, and the causes upon which they are based, include:

1. Strict Liability for defects in:
    a. Design
    b. Physical condition
    c. Warning
2. Negligence
    a. Design
    b. Manufacture
    c. Warning
    d. Testing and inspection
3. Breach of Warranty:
    a. Express warranty
    b. Implied warranty of merchantability
    c. Implied warranty of fitness for a particular purpose.

Only the strict liability instructions are presented here. Please consult other chapters for instructions on other theories of liability.

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Chapter 7 – Products Liability

PRODUCTS LIABILITY

PREFACE

The term "products liability" describes various rules of law under which one may seek compensation for damages resulting from harmful defective products. These rules of law, and the causes upon which they are based, include:

1. Strict Liability for defects in:
    a. Design
    b. Physical condition
    c. Warning
2. Negligence
    a. Design
    b. Manufacture
    c. Warning
    d. Testing and inspection
3. Breach of Warranty:
    a. Express warranty
    b. Implied warranty of merchantability
    c. Implied warranty of fitness for a particular purpose.

Only the strict liability instructions are presented here. Please consult other chapters for instructions on other theories of liability.

INSTRUCTION NO._____

One who sells a product in a defective condition to a user is strictly liable for physical harm to the user or the user's property caused by the product if the seller is engaged in the business of selling such a product [and the product is expected to and does reach the user without substantial change in the condition in which it is sold].

This rule of strict liability applies even though the seller has exercised all possible care and the user did not buy the product from or enter into any contractual relation with the seller.

GIVEN: _____
District Judge

NOTE: In cases of injuries to bystanders, the court should modify the "user" language accordingly.

Source: Section 27-1-719, MCA and *McAlpine v. Rhone-Poulenc AG Co.*, 2000 MT 383, 304 Mont. 31, 16 P.3d 1054.

Comment: Bracketed material does not apply to claims based upon improper product design. See *Rix v. General Motors,* (1986), 222 Mont. 318, 723 P.2d 195.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W___

INSTRUCTION NO. _____

A product is in a defective condition to a user if it is dangerous to an extent beyond that anticipated by the ordinary user.

GIVEN:_____
District Judge

Source: *McAlpine v. Rhone-Poulenc AG Co.,* 2000 Mont. 383, 304 Mont. 31, 16 P.3d 1054.; *Wise v. Ford Motor Co.,* (1997), 284 Mont. 336, 340, 943 P.2d 1310, 1312; MCA 27-1-719; *McJunkin v. Kaufman and Broad Home Systems, Inc.*, (1987), 229 Mont. 432, 748 P.2d 910; *Stenberg v. Beatrice Foods*, (1978), 176 Mont. 123, 576 P.2d 725.

Comment: This instruction may be used with MPI 7.02 and 7.03

Proposed by P(#____), D(#_____), Ct(#____)

Disposition G___ R___ W____

MPI2d 7.01 Products Liability - Strict Liability
(Defective Product Defined Generally)

INSTRUCTION NO._____

A product may cause injury because of its design even though it was faultlessly manufactured. In order to recover for such injury, the plaintiff must prove:

First, that at the time of sale by the defendant the product was in a defective condition because of its design.

Second, that the design of the product caused injury to the plaintiff.

GIVEN:_____
District Judge

Source: MCA 27-1-719. *McAlpine v. Rhone-Poulenc AG Co.*, 2000 Mont. 383, 304 Mont 31, 16 P.3d, 1054; *Kuiper v. Goodyear Tire & Rubber*, (1986), 207 Mont. 37, 60, 673 P.2d 1208, 1220-21.

Comment:
(1) This instruction should be used with MPI2d 7.00.
(2) When dealing with design cases, read *Rix v. General Motors Corp.*, (1986), 222 Mont. 318, 723 P.2d 195, to determine whether this instruction is appropriate or a more specific instruction would be required.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 7.02 Products Liability - Strict Liability (Burden of Proof - Defective Design)

INSTRUCTION NO. _____

A product may cause injury because of the way it is manufactured. In order to recover for such injury, the plaintiff must prove:

First, that at the time of sale by the defendant the product was in a defective condition because of a manufacturing defect. A manufacturing defect exists when a product fails to conform to its design.

Second, that the manufacturing defect caused injury to the plaintiff.

GIVEN:_____
District Judge

Source: *McAlpine v. Rhone-Poulenc AG Co.,* (2000), 2000 MT 383, 304 Mont. 31, 16 P.3d 1054; *Kuiper v. Goodyear Tire & Rubber*, (1986), 207 Mont. 37, 60, 673 P.2d 1208, 1220-21.

Comment: This instruction should be used with MPI 7.00.

Proposed by P(#____), D(#____) Ct(#____)

Disposition G___ R___ W___

MPI2d 7.03 Products Liability - Strict Liability
(Burden of Proof - Manufacturing Defect)

INSTRUCTION NO._____

A product may cause injury because of inadequate warning. In order to recover for such injury, the plaintiff must prove:

First, that the defendant sold the product in a defective condition because of a failure to adequately warn of those dangers which would not be readily recognized by the ordinary user of the product.

Second, that the failure to provide adequate warning caused injury to the plaintiff.

GIVEN:_____
District Judge

NOTE: If case involves a claim of inadequate instructions, revise this language in accordance with *Streich v. Hilton-Davis, a Div. of Sterling Drug, Inc.*, (1984), 214 Mont. 44, 56, 692 P.2d 440, 444, *Emery v. Federated Foods, Inc.*, ___ Mont. ___, 863 P.2d 426 (1993).

Source: *McAlpine v. Rhone-Poulenc AG Co.*, 2000 MT 383, 304 Mont. 31, 16 P.3d 1054; MCA 27-1-719. See *Streich v. Hilton-Davis, a Div. of Sterling Drug, Inc.*, (1984), 214 Mont. 44, 56, 692 P.2d 440, 444 and *Tacke v. Vermeer Mfg. Co.*, (1986), 220 Mont. 1, 713 P.2d 527.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 7.04 Products Liability - Strict Liability
(Defective Condition - Failure To Warn)

INSTRUCTION NO._____

The fact that a defect is open and obvious does not prevent a finding that the product is in a defective condition.

[An open and obvious defect may, however, relate to assumption of risk, which I will instruct you upon next.]

GIVEN:_____
District Judge

NOTE:
(1) Bracketed language to be given only if MPI2d 7.06 is given.
(2) In cases of injury to bystanders, the court should modify the "user" language accordingly.

Source: See *Brown v. North American Manufacturing*, (1978), 176 Mont. 98, 108, 576 P.2d 711, 717 and *Tacke v. Vermeer Mfg. Co.*, (1986), 220 Mont. 1, 713 P.2d 527. *McAlpine v. Rhone-Poulenc AG Co.*, 2000 Mont. 383, __ P.2d __ (2000).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 7.05 Products Liability - Strict Liability (Definition of Defective Condition – Open and Obvious)

INSTRUCTION NO._____

Assumption of risk is a defense to a strict liability claim. In order to establish assumption of risk, the defendant must prove:

First, that the defect was open and obvious or the plaintiff discovered the product defect;

Second, that even though the defect was open and obvious, or the plaintiff discovered the defect, the plaintiff unreasonably made use of the product; and

Third, that the plaintiff was injured as a result of the use.

Assumption of risk by the plaintiff does not bar (his) (her) recovery unless (his) (her) responsibility for the injury is greater than the defendant's. However, any damages you award will be reduced by the Court according to the percentage of plaintiff's responsibility as determined by you.

GIVEN: _____
District Judge

Source: Section 27-1-719(5)(a), MCA.

NOTE: The Commission considered the language of *Lutz v. National Crane Corp.*, (1994), 267 Mont. 368, 884 P. 2d 455, on the subject of assumption of risk in drafting this instruction.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 7.06 Products Liability - Strict Liability (Defective Condition – Assumption of Risk)

INSTRUCTION NO._____

Misuse of the product is a defense to a strict liability claim. In order to establish misuse, the defendant must prove:

First, that the plaintiff unreasonably misused the product [in a manner which was not foreseeable by defendant].

Second, that such misuse was a cause of plaintiff's injury.

Misuse of the product by the plaintiff does not bar plaintiff's recovery unless plaintiff's responsibility for the injury is greater than the defendant's responsibility. However, any damages you award will be reduced by the Court according to the percentage of plaintiff's responsibility as determined by you.

GIVEN:_____
District Judge

NOTE: Use bracketed language only if foreseeability of the misuse is an issue of fact. See *Hart-Albin Co. v. McLees*, (1994), 264 Mont. 1, 870 P.2d 51 and *Lutz v. National Crane Corp.*, (1994), 267 Mont. 368, 884 P.2d 455.

Source: Section 27-1-719(5)(b), MCA.

Comment: This instruction should not be given where foreseeability of misuse is admitted or has been determined as a matter of law.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 7.07 Products Liability - Strict Liability (Misuse Defense)

Montana Pattern Instructions
January, 2003 Edition

MPI 2d

Chapter 8 – Bad Faith

INSTRUCTION NO._____

In every [insurance] contract there is an implied obligation of good faith and fair dealing on the part of both parties which requires that neither party do anything unreasonable which deprives the other of the benefits of the contract. The conduct required is honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. Violation of this obligation is referred to as "bad faith".

GIVEN:_____
District Judge

Source: *Thomas*, supra

Comment: Use only in the first party common law bad faith claims which are those not arising from claims handling and not limited by §33-18-242 MCA. See, *Thomas v. Northwestern Nat'l. Ins. Co.*, 1998 MT 343, 292 Mont. 357, 973 P.2d 804; *O'Fallon v. Farmers Ins. Exch.*, 260 Mont. 233, 859 P.2d 1008 (1993).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

An insurance company to give as much consideration to the interests of its insured as it does to its own interests when evaluating an offer to settle a claim against the insured for an amount within the insured's policy limits.

GIVEN:_____
District Judge

Source: *Gibson v. Western Fire Ins. Co.,* 210 Mont. 267, 682 P.2d 725, 730-31 (1984).

Comment: Use only in first party claims, statutory or contractual, based on a failure to settle within the limits.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G___ R___ W___

MPI2d 8.01 Insurance – First Party Bad Faith (Failure to Settle)

INSTRUCTION NO._____

In deciding whether the insurance company breached its duty in rejecting an offer of settlement within its insured's policy limits, you should consider all the evidence as of the time the offer was rejected, which may include:

1. Whether the claimant's injuries are so severe that any verdict against the insured is likely to be greatly in excess of the policy limits;

2. Whether the facts indicate that a verdict for the insured on the issue of liability is doubtful;

3. Whether the insurance company has given due consideration to the recommendations of the attorney it has hired to defend the insured;

4. Whether the insured has been informed of all settlement demands and offers;

5. Whether the insured has demanded that the insurance company settle for an amount within the policy limits;

6. Whether the company has given due consideration to any offer of the insured to contribute money to the settlement offer to the claimant.

GIVEN:_____
District Judge

Source: *Gibson v. Western Fire Ins. Co.*, 210 Mont. 267, 682 P.2d 725, 730-31 (1984).

Comment: Use only in first party claims, statutory or contractual, based on a failure to settle within the limits.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 8.02 Bad Faith - Failure to Settle (Standard of Conduct)

INSTRUCTION NO._____

An insurance company may not,

[insert language of applicable subpart of §33-18-201, MCA]

GIVEN:_____
District Judge

Source: §§33-18-21 and 33-18-242(1), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 8.03 Bad Faith - Statutory Obligation (Insurance - First and Third Party)

INSTRUCTION NO._____

An insurer may not be held liable if it had a reasonable basis in law or in fact for contesting [the claim] [the amount of the claim].

GIVEN:_____
District Judge

Source: §33-18-242(5), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 8.04 Bad Faith - Statutory Obligation (Reasonable Basis)

INSTRUCTION NO._____

An insurer owes a claimant the duty to handle his or her claim fairly and in good faith.

GIVEN:_____
District Judge

Source: *Brewington v. Employers Fire Ins. Co.*, 1999 MT 312, 297 Mont. 243, 992 P.2d 237.

Comment: For use only in third party common law bad faith claims.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 8.05 Insurance – Third Party Bad Faith (Common Law Claim)

Montana Pattern Instructions
January, 2003 Edition

MPI 2d

Chapter 9 – Intentional Torts

INSTRUCTION NO._____

A plaintiff who suffered any physical or mental injury as a result of [assault and/or battery] committed upon him/her by a defendant is entitled to recover compensation for such injury from that defendant.

GIVEN:_____
District Judge

Source: See *Johnson v. Supersave Markets*, 686 P.2d 209, 212-13, 41 St. Rep. 1495, 1499-1500 (1984).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

An assault is any intentional threat of harmful or offensive contact with another by force under circumstances which create a well founded fear of such contact, coupled with the apparent present ability to carry out the threat.

A battery is an intentional contact by one person with the person of another which is harmful or offensive.

GIVEN:_____
District Judge

NOTE: These definitions are consistent with Restatement (Second) of Torts sections 13 to 34 (1965).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.01 Intentional Torts - Assault & Battery Defined

INSTRUCTION NO._____

A person may consent to an act which would otherwise be an assault or battery by voluntarily participating in or agreeing to the act, in which case there is no liability for the act.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.02 Intentional Torts - Assault or Battery (Consent As Defense)

INSTRUCTION NO._____

Words alone, no matter how objectionable or insulting, will not justify a battery against the person who speaks them.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.03 Intentional Torts - Battery (Words Not Justification)

INSTRUCTION NO._____

An arresting officer may use such force as is reasonably necessary to effect a lawful arrest. However, a police officer who uses more force than is reasonably necessary to effect a lawful arrest commits a battery upon the person arrested as to such excessive force.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.04 Intentional Torts - Battery (Use of Force by Police in Arrest

INSTRUCTION NO._____

A person who is unlawfully attacked or reasonably believes he/she is about to be unlawfully attacked may use such force in self-defense to protect himself/herself as reasonably appears necessary under the existing circumstances.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.05 Intentional Torts - Battery (Self Defense)

INSTRUCTION NO._____

A plaintiff who has been [falsely arrested or] falsely imprisoned by defendant is entitled to recover damages therefor from that defendant.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.06 Intentional Torts - False Imprisonment

INSTRUCTION NO._____

False imprisonment is the unlawful violation of the personal liberty of another. To constitute a false imprisonment there must be an intentional and unlawful restraint, confinement or detention which compels the person to stay or go somewhere against his/her will. The restraint necessary to constitute false imprisonment may result either from the exercise of force or from an express or implied threat of force. [It is not necessary to constitute false imprisonment that there be confinement in a jail or prison.]

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.07 Intentional Torts - False Imprisonment Defined

INSTRUCTION NO._____

A false arrest is the unlawful taking of a person into custody.

GIVEN:_____
District Judge

NOTE: See Section 46-6-401 MCA (renumbered Sec. 46-6-210, MCA, by Code Commissioner, 1991.) This statute is a restatement of 1987 MCA 46-6-401(1)(a) through (1)(c). The statute establishes those instances in which an arrest may be made under a warrant, whether issued in this state or from another state.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.08 Intentional Torts - False Arrest Defined

INSTRUCTION NO._____

A peace officer may, without a warrant, lawfully arrest a person:

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.09 Intentional Torts - Lawful Arrest

INSTRUCTION NO._____

A private person may lawfully arrest another:

[When he/she reasonably believes that an offense was committed or attempted in his/her presence.]

[When a felony has been committed, and he/she reasonably believes the person arrested committed it.]

GIVEN:_____
District Judge

Source: See Section 46-6-502, MCA. (That section was changed in 1991. It now reads as follows:

(1) A private person may arrest another when there is probably cause to believe that the person is committing or has committed an offense and the existing circumstances require the person's immediate arrest.

(2) A private person making an arrest shall immediately notify the nearest available law enforcement agency or peace officer and give custody of the person arrested to the officer or agency.

History: En. 95-611 by Sec. 1, Ch. 196, L.1967; and Sec. 3, Ch. 274, L.1974; R.C.M. 1947, 96-611 (part); amd. Sec. 40, Ch. 800, L.1991.)

Comments: 1991 Comment: This statute establishes the general authorization for an arrest by a private person and provides the appropriate limitations on custody. The 1987 code section was similar, but if the offense had not been committed in the person's presence, the offense had to be a felony before a private arrest could be made. See 1987 MCA 46-6-502(2). This statute eliminates the felony-misdemeanor distinction but provides that the "circumstances require the person's immediate

arrest". The provisions allowing a warrantless arrest by a police officer or by a private citizen are kept distinct but parallel.

NOTE: In shoplifting cases see sections 30-11-301, -302, and *46-6-501 to -504, MCA; but see *Duran v. Buttrey Food*, 189 Mont. 381, 393, 616 P.2d 327, 333 (1980) (holding section 46-6-503, MCA, unconstitutional in part).

*Sec. 46-6-501, MCA repealed. Sec. 263, Ch. 800, L.1991. History: En. 95-611.1 by Sec. 1, Ch. 274, L. 1974; R.C.M. 1947, 95-611.1.

*46-6-503 repealed. Sec. 263, Ch. 800, L.1991. History: En. 95-611 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 274, L.1974; R.C.M. 1947, 95-611(part).

*46-6-504 repealed. Sec. 1, Ch. 205, L. 1987. History: En. 95-611.2, by Sec. 2, Ch. 274, L.1974; R.C.M. 1947, 95-611.2.

Duran v. Buttrey Food, overruled on different grounds by *State v. Long,* (1985), 216 Mont. 65, 67 (exclusionary rule as applied to private search).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

Any person lawfully in possession of property may, for the purpose of protecting it, restrain, for a reasonable time and for the purpose of investigation, one whom he/she reasonably believes is [stealing] [or] [damaging] his/her property.

GIVEN:_____
District Judge

NOTE: In shoplifting cases see sections 30-11-301, -302, and 46-6-501 to -504, MCA; but see *Duran v. Buttrey Food*, 189 Mont. 381, 393, 616 P.2d 327, 333 (1980) (holding section 46-6-503, MCA, unconstitutional in part).

See MPI2d 9.10 for Sec. 46-6-501 to 504, and *Duran v. Buttery Food.*

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.11 Intentional Torts - Lawful Detention

INSTRUCTION NO._____

A plaintiff who has suffered harm as a result of a malicious prosecution by a defendant is entitled to recover compensation for such harm from that defendant.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.12 Intentional Torts - Malicious Prosecution

INSTRUCTION NO._____

To prove malicious prosecution, a plaintiff must show (a) that a judicial proceeding was commenced and prosecuted against him/her; (b) that the defendant was responsible for instigating, prosecuting or continuing such proceeding; (c) that there was no probable cause for defendant's act or acts; (d) that he/she was actuated by malice; (e) that the proceeding terminated favorably for plaintiff; and (f) that plaintiff suffered damage with the amount thereof.

The judicial proceeding complained of may be civil, criminal, administrative or disciplinary in nature.

GIVEN:_____
District Judge

Source: See *McGuire v. Armitage*, 184 Mont. 407, 410-11, 603 P.2d 253, 255 (1979).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.13 Intentional Torts - Malicious Prosecution Defined

INSTRUCTION NO._____

To constitute probable cause for the criminal prosecution of the plaintiff in this case, the evidence must establish that there are reasonable grounds for suspicion, supported by circumstances reasonably strong in themselves to warrant a belief in a reasonably prudent and cautious person that the plaintiff is guilty of the offense charged.

GIVEN:_____
District Judge

Source: See *Reece v. Pierce Flooring*, 634 P.2d 640, 643, 38 St. Rep. 1655, 1659 (1981) (quoting *Cornner v. Hamilton*, 62 Mont. 239, 243, 204 P. 489, 491 (1922).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.14 Intentional Torts - Malicious Prosecution
(Probable Cause Defined)

INSTRUCTION NO._____

Malice as used in these instructions means:

[See Section 1-1-204(3) and 27-1-221(2), MCA]

GIVEN:_____
District Judge

Source: See also *Orser v. State*, 178 Mont. 126, 582 P.2d 1227 (1978).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.15 Intentional Torts - Malicious Prosecution (Malice Defined)

INSTRUCTION NO._____

A party suffering damage as a result of abuse of a legal process by another party is entitled to recover compensation from that party for such harm.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.16 Intentional Torts - Abuse of Process

INSTRUCTION NO._____

To prove abuse of process a party must show:

(a) That the process though properly instituted was for an improper motive;

(b) That such process was put to an illegal use or one for which it was not intended; and

(c) That damage resulted to the party or the party's property.

GIVEN:_____
District Judge

Source: *See Hopper v. Drysdale*, 524 F. Supp. 1039, 1041 (D. Mont. 1981), cited in *Brault v. Smith*, 679 P.2d 236, 240, 41 St. Rep. 527, 532 (1984); see also 1 Am. Jur. 2d Abuse of Process section 4 (1962). *Prosser*, Torts, 4th Ed., section 121, Abuse of Process.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.17 Intentional Torts - Abuse of Process Defined

INSTRUCTION NO._____

Plaintiff seeks to recover compensation for defamation. Defamation is the libel or slander of a party.

[Libel is a false and unprivileged publication by writing, [printing,] [picture,] [effigy,] or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or disgrace, or which causes such party to be shunned or avoided, or which has a tendency to injure such party in such party's occupation].

[Slander is a false and unprivileged oral statement made either in person or by radio or television or by any other means which [charges any person with crime, or with having been indicted, convicted, or punished for crime] [imputes to such party the present existence of an infectious, contagious, or loathsome disease] [tends directly to injure such party in respect to the office, profession, trade or business, either by imputing to such party general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to the office, profession, trade, or business that has a natural tendency to lessen its profits] [imputes to such person impotence or a want of chastity] [by natural consequence, causes actual damage].]

GIVEN:_____
District Judge

NOTE: Defamation cases are affected by current United State Supreme Court cases which should be consulted.

Source: See sections 27-1-801 to -803, MCA.

Comment: This instruction is designed for use in either an action for libel or slander by deletion of the bracketed material which is not applicable to the case.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

The defamatory nature of a statement [or publication] must be determined by its natural and probable effect on the mind of the average [reader] [listener]. Consequently, if the average [reader] [listener] would regard it as defamatory, it may be [libelous] [slanderous] even though it might also have an innocent meaning.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.19 Intentional Torts - Defamation (Dual Meaning)

INSTRUCTION NO._____

In order for a false and unprivileged publication [or statement] to constitute [libel] [slander], it must be communicated by its author or speaker to one other than the plaintiff who understands its defamatory meaning and its application to plaintiff.

GIVEN:_____
District Judge

Source: *See Granger v. Time, Inc.,* 174 Mont. 42, 48, 568 P.2d 535, 539 (1977).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

A publication [or statement] about [the official conduct of a public official] [or other conduct which concerns fitness for public office] [a candidate for public office] [a public figure] is absolutely privileged, even if false and untrue, unless the publication [or statement] was made by the defendant with knowlege that it was false or with a reckless disregard for the truth, or unless the defendant must have had serious doubts of its truth at the time of the publication [or statement].

GIVEN:_____
District Judge

Source: See *Williams v. Pasma*, 202 Mont. 66, 72-73, 656 P.2d 212, 215 (1982) and *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

A privileged publication [or statement] is one made:

[In the proper discharge of an official duty;]

[In any legislative or judicial proceeding or in any other official proceeding authorized by law;]

[In a communication without malice to a person interested therein by one who is also interested or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent or who is requested by the person interested to give the information;]

[By a fair and true report without malice of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.]

GIVEN:_____
District Judge

NOTE: Use only applicable portions of bracketed materials.

Source: Section 27-1-804, MCA. Also see *Cox v. Lee Enterprises*, 43 St. Rptr. 1476 (1986).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.22 Intentional Torts – Defamation (Privileged Publication)

INSTRUCTION NO._____

When punitive damages are claimed because of a defamatory publication in [or broadcast on] any newspaper, [magazine,] [periodical,] [radio] [or television station,] [or cable television system,] the plaintiff must prove that a written notice for correction was given the defendant affording a reasonable opportunity to correct the defamatory matter. Such writing shall specify the article [or broadcast] and the statements which are claimed to be defamatory and a statement of what is claimed to be the truth.

If the publication or broadcast complained of was made under honest mistake, then a correction timely published or broadcast without comment in a position and type as prominent as the alleged libel or in a broadcast made at the same time of day as the broadcast complained of and of at least equal duration constitutes a defense against the recovery of punitive damages.

A correction published in the first issue of a newspaper, magazine, or periodical after the expiration of one week from the receipt of said written notice is within a reasonable time. In the case of radio and television stations and cable television systems, a broadcast made at the same time of the day as the braodcast complained of and of at least equal duration which is made within seven (7) days following receipt of such written notice is within a reasonable time.

To the extent that the true facts can be ascertained, with

reasonable diligence, only a retraction statement of those facts constitutes a correction; otherwise the publication or broadcast of the defamed person's statement of the truth to the extent it is not defamatory of another, scurrilous, or otherwise improper for publication or broadcast constitutes a correction.

GIVEN:_____
District Judge

Source: See sections 27-1-818 to -821, MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

No owner or operator of a radio broadcasting station is liable for defamation on account of having made its broadcasting facilities available to any person, including but not limited to a candidate for public office, for discussion of controversial or other subjects in the absence of actual malice on the part of such owner or operator.

GIVEN:_____
District Judge

Source: See section 27-1-811, MCA; see also sections 27-1-812 and 813, MCA.

Comment: This instruction logically should apply also to cases involving television broadcasting stations.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.24 Intentional Torts – Defamation (Radio Station Privilege)

INSTRUCTION NO._____

A true statement is not defamatory. Compensation may not be awarded for the making or publishing of a true statement regardless of the motive of the one making the publication or statement.

GIVEN:_____
District Judge

Source: See sections 27-1-801 to -803, MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 9.25 Intentional Torts - Defamation (True Statements)

INSTRUCTION NO._____

The repetition of a defamatory statement by another person is a re-publication of the original defamation and the person who repeated it is liable even though it is repeated accurately.

GIVEN:_____
District Judge

Comment: To be used where no privilege is involved.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

If you find that the defendant defamed plaintiff and that such defamation caused damage to plaintiff, you may award plaintiff compensation for any losses suffered to date and which are reasonably probable to occur in the future in respect to plaintiff's property, business, trade, profession, or occupation including the amount of actual damage which is a natural consequence of the publication of the defamation.

You may also consider, but are not limited to the following:

(1) The extent of the publicity given by the defendant to the defamation;

(2) Plaintiff's good name, reputation, and the loss thereof;

(3) Plaintiff's shame, mortification, injured feelings and mental suffering;

[(4) Plaintiff's standing in the community.]

[(5) Plaintiff's standing in the business or professional community.]

In determining the amount of plaintiff's damage, the law does not establish any absolute standard by which to compute such damage; therefore, you may exercise your discretion but must do so without passion or prejudice for or against either party. [Furthermore, such damages shall not be enhanced by a repetition of such [libel] [slander] by third persons who are not parties to

this action unless such repetition was authorized or intended or could have been reasonably foreseen.]

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

Comment: In claims for punitive damages arising from defamation, see *Dunn & Bradstreet, Inc., v. Greenmoss Builders*, 472 U.S. __, 105 S. Ct. 2939 (1985), distinguishing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); see also Section 27-1-221, MCA. Beware of distinctions in types of malice required to be proven between media and non-media defendants. See also *Philadelphia Newspapers Inc. v. Hepp*, 475 U.S. 767, 89 L.Ed. 783, 106 S.Ct. 1558 (19__).

INSTRUCTION NO. _____

The plaintiff has alleged fraud. To establish this claim he/she must prove:

(1) a representation was made;

(2) the representation was false;

(3) the representation was material;

(4) the defendant knew the representation was false or was ignorant of whether it was true;

(5) the defendant intended the plaintiff would rely upon the representation;

(6) the plaintiff was ignorant of the falsity of the representation;

(7) the plaintiff relied upon the representation;

(8) the plaintiff had a right to rely on the representation; and

(9) the plaintiff was damaged by reliance on the representation.

GIVEN:_____
District Judge

Source: *Northwest Trust and Trailer Sales v. Dvorak*, (1994), 269 Mont. 150, 887 P.2d 260; *Van Ettinger v. Pappin*, (1978), 180 Mont. 1.

Comment: If less than all elements are at issue, instruct only on those at issue.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G___R___W___

MPI2d 9.29 Fraud

INSTRUCTION NO. _____

Plaintiff claims constructive fraud. To establish this claim, plaintiff must prove (1) the defendant breached a duty by [specify the duty breached], (2) such breach misled the plaintiff to his/her detriment [or the detriment of someone claiming under him/her] (3) resulting in an advantage to the defendant [or anyone claiming under him/her]. It is not necessary to prove that the defendant acted with fraudulent intent or with intent to deceive.

GIVEN:_____
District Judge

Source: MCE 28-2-406

Proposed by P(#____), D(#____), Ct(#____)

Disposition G___R___W___

MPI2d 9.30 Constructive Fraud

Montana Pattern Instructions
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MPI 2d

Chapter 10 – Vicarious Liability

INSTRUCTION NO. _____

An agent is one who represents another, called a principal, in dealings with third persons.

GIVEN:_____
District Judge

Source: See section 28-10-101, MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 10.00 Vicarious Liability - Principal and Agent (Agent Defined)

INSTRUCTION NO. _____

Any person [corporation] may appoint an agent and any person [corporation] may be an agent.

GIVEN:_____
District Judge

Source: See section 28-10-104, MCA.

Comment: Not to be used if the principal's capacity to contract is in issue.

Proposed by P#(____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 10.01 Vicarious Liability - Principal and Agent (Appointment)

INSTRUCTION NO. _____

One may be an agent although he/she receives no payment for his/her services.

GIVEN:_____
District Judge

Source: See section 28-10-202, MCA; see also Restatement (Second) of Agency section 16 (1958).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 10.02 Vicarious Liability - Principal and Agent (Consideration Unnecessary)

INSTRUCTION NO. _____

Any act or omission of an agent [name of agent] is the act or omission of a principal [name of principal].

GIVEN:_____
District Judge

Comment: Names to be used when appointment and authorization are not in issue. Names not to be used when appointment and authorization are in issue.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G___ R___ W___

MPI2d 10.03 Vicarious Liability - Principal and Agent (Vicarious Liability)

INSTRUCTION NO. _____

See statutes for principal-agent instructions on the following topics:

Sections 28-10-301 to -303, MCA - Duties of Agent;

Sections 28-10-401 to -423, MCA - Authority of Agent;

Sections 28-10-501 to -503, MCA - Subagents;

Sections 28-10-601 to -609, MCA - Rights and Liabilities of Principal;

Sections 28-10-701 to -704, MCA - Agent's Responsibility to Third Persons;

Sections 28-10-801 and -802, MCA - Termination of Agency.

MPI2d 10.04 Vicarious Liability - Principal and Agent (Duties - Authority – Rights – Responsibility – Termination – Subagents)

INSTRUCTION NO. _____

An employer is a person who has the right to control the way his/her employee does his/her work.

An employee is the person whom the employer has the right to control in the way he/she does his/her work.

GIVEN:_____
District Judge

Source: See *Elkins v. Husky Oil*, 153 Mont. 159, 162-63, 455 P.2d 329, 330-31, (1969).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 10.05 Vicarious Liability - Employment
(Employer/Employee Defined)

INSTRUCTION NO. _____

An employer is liable for all damages caused by the negligence of his/her employee while acting within the scope of his/her employment.

GIVEN:_____
District Judge

Source: *Keller v. Safeway Stores*, 111 Mont. 28, 35-36, 108 P.2d 605, 610 (1940).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 10.06 Vicarious Liability - Employment (Respondeat Superior)

INSTRUCTION NO. _____

The employer is responsible for his/her employee's actions if they were in furtherance of or incidental to the employment even though the actions [also benefitted the employee or a third person] [were fraudulent, willful, malicious, or forbidden.]

GIVEN:_____
District Judge

Source: See *Keller v. Safeway Stores*, 111 Mont. 28, 36-38, 108 P.2d 605, 610-11 (1940); *Poulsen v. Treasure State Industries*, 626 P.2d 822 (1981). See also Restatement (Second) of Agency sections 228, 230 and 231 (1958).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 10.07 Vicarious Liability - Employment (Scope)

INSTRUCTION NO. _____

Comment: No instruction has been drafted on the subject. Whether an agent has deviated from the scope of employment depends on the particular facts of each case and any such instruction should be tailored accordingly. See Restatement (Second) of Agency, section 228; BAJI, sections 13.01, 13.02; 3 Am. Jur. 2d Agency, section 280.

INSTRUCTION NO. _____

Once an employment relationship is shown, the presumption is that it continues. The employer has the burden of proving either that the employment was terminated or that the authority of the employee was limited.

GIVEN:_____
District Judge

Source: See *Healy v. Ginoff*, 69 Mont. 116, 131-32, 220 P. 539, 544 (1923), cited with approval in *Exchange State Bank v. Occidental Elevator Co.*, 95 Mont. 78, 89, 24 P.2d 126, 130 (1933).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

An independent contractor is a person who is hired to produce a specific result but who is not subject to the right of control of the employer as to the way he/she brings about that result. Generally, a person who hires an independent contractor is not liable for his/her actions.

GIVEN:_____
District Judge

Sources: See *Jensen v. Barbour*, (1895), 15 Mont. 582, 591, 39 P. 906, 908, *questioned by Greening v. Gazette Printing Co. (1939), 88 P.2d 862, 865;* see also *Storrusten v. Harrison*, 169 Mont. 525, 533, 549 P.2d 464, 469 (1976).

Comment: There are situations where the person hiring the independent contractor may be liable for his/her actions. See *Beckman v. Butte-Silver Bow County*, 299 Mont. 389, 11 P.3d 348 (1999). Some examples are seen in the following cases: See *Mydlarz v. Palmer/Duncan Construction,* 682 P.2d 695, 702-03, 41 St. Rep. 738, 745 (1984) (nondelegable duty); *Stepanek v. Kober Construction,* (1981), 625 P.2d 51, 55, 38 St. Rep. 385, 390 (nondelegable duty) (questioned by *Steiner v. Dept. of Highways*, (1994), 269 Mont. 270, 275. "Thus, the distinction discussed in *Stepanek* between third parties and employees of subcontractors no longer applies in Montana and employees of subcontractors may sue the general contractor for injuries received on the job if the general contractor has a nondelegable duty to the subcontractor's employees, notwithstanding the fact that the employee's exclusive remedies against the employer are covered under the Workers' Compensation Act."; *Shannon v. Howard S. Wright Corp.,* 181 Mont. 269, 276-77, 593 P.2d 438, 442 (1979) (retention of control); *Fegles Construction v. McLaughlin Construction*, 205 F.2d 637, 640 (9th Cir. 1953) (due care as to inherent danger). For other cases, see *O'Leary v. James & Wunderlich*, 192 F.Supp. 462, 473-74 (D. Mont. 1960), aff'd per curiam, 288 F.2d 462 (9th Cir. 1961).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 10.10 Vicarious Liability - Independent Contractor

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Chapter 11 – Motor Vehicles

INSTRUCTION NO._____

Montana law provides: [Insert appropriate statutory language. See Title 61, MCA, for specific motor vehicle statutes.]

If you find from the evidence that a party to this action violated the law just read to you, you are instructed that such conduct was negligence as a matter of law.

However, in this action, a violation of law is of no consequence unless it was a [proximate] [legal] cause of an injury to the plaintiff.

GIVEN:_____
District Judge

Comment: Regarding proximate and legal cause concepts, see comments to MPI2d 2.07 and 2.08.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2 11.00 Motor Vehicles - Statutory Violations

INSTRUCTION NO._____

Subject to the maximum speed limits as provided by law, every person operating or driving a vehicle of any character on a public highway of this state shall drive it in a careful and prudent manner, and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account the amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to view ahead, and he/she shall drive it so as not to unduly or unreasonably endanger the life, limb, property, or rights of a person entitled to the use of the street or highway.

GIVEN:_____
District Judge

Source: See section 61-8-303(1), MCA. Statute has been superceded to include "subject to maximum speed limits." See 61-8-303(1) and (4), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

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Chapter 12 – Premises Liability

INSTRUCTION NO._____

The defendant has the duty to exercise ordinary care to keep his/her premises reasonably safe for all persons who forseeably might come upon them, [and to warn such persons of any hidden or lurking danger upon such premises]. Failure to do so is negligence.

GIVEN:_____

District Judge

NOTE: Use bracketed material only if case involves claims that injury was caused by a hidden or lurking danger.

Source: *Dobrocke v. City of Columbia Falls*, 2000 MT 179, 300 Mont. 348, 8 P.3d 71; *Richardson v. Corvallis Public School District*, (1997), 950 P.2d 748, 54 St.Rep. 1422; See Section 27-1-701 , MCA, quoted in *Limberhand*, 706 P.2d 496, 42 St.Rep. At 1465; id at 498-99, 42 St.Rep. at 1468-69; *Corrigan v. Janney*, 626 P.2d 838, overruled on other grounds, *Meech v. Hillhaven West Inc.,* 776 P.2d 488 (1989); and *Kaiser v. Town of Whitehall*, 718 P.2d 1341 (1986).

Comment: In addition to considering the general duty expressed in this instruction, court and counsel should refer to statutes and related case law applicable to premises liability in particular cases, which may determine whether 12.00 should be given. *See e.g.* Title 23, Chapter 2, Title 27, Chapter 1, Part 7 and Title 70, Chapter 16, Part 3.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

Defendant's duty to use ordinary care applies to any activity or condition on the premises even if the danger is known or obvious to the plaintiff, unless the defendant could not foresee the (injury/damage/loss).

GIVEN:_____
District Judge

Source: *Dobrocke v. City of Columbia Falls*, 2000 MT 179, 300 Mont. 348, 8 P.3d 71; *Richardson v. Corvallis Pub. School Dist.,* 950 P.2d 748, (1977); 54 St. Rep. 1422; also see *Dunham v. Southside National Bank*, 169 Mont. 466, 468-69, 548 P.2d 1383, 1384-85 (1976), overruled on other grounds.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 12.01 Premises Liability – Known or obvious condition

INSTRUCTION NO._____

Defendant is negligent if

(1) he/she maintained an artificial condition in a place which he/she knew or should have known that children were likely to trespass;

(2) the conditions involved an unreasonable risk of death or serious bodily harm;

(3) children, because of their youth, were unable to discover the conditions or realize the danger;

(4) the utility of maintaining the condition was slight compared to the risk it presented to young children;

(5) he/she failed to exercise reasonable care to eliminate the danger or otherwise protect the children.

GIVEN:_____
District Judge

Source: See *Big Man v. State*, 626 P.2d 235, 240, 38 St. Rep. 362, 368 (1981).

Comments:
(1) See Comment to MPI2d 12.00.
(2) Not to be used in cases involving drowning of immature children in either natural or artificial streams or bodies of water maintained for useful purposes unless there is some peculiar danger, in the nature of a hidden peril or trap.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 12.02 Premises Liability - Attractive Nuisance (Children)

INSTRUCTION NO._____

A landlord who knew or should have known of an unsafe condition on the premises at the time of renting, has the duty to notify the tenant of its existence if the tenant has no knowledge of the unsafe condition and is not likely to discover it by a reasonable inspection of the premises.

GIVEN:_____
District Judge

Source: See Section 27-1-701, MCA, cited in *Corrigan v. Janney*, 626 P.2d 838, 841, (1981); (Section 58-607, RCM (1947)) overruled on other grounds, *Meech v. Hillhaven West Inc.,* 776 P.2d 488 (1989); see also *Rennick v. Hoover*, 186 Mont. 167, 171, 606 P.2d 1079, 1081 (1980).

Comment: See Comment to MPI2d 12.00.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 12.03 Premises Liability - Leased Premises (Latent Defects)

INSTRUCTION NO._____

A landlord has the duty to use ordinary care to keep that part of the premises [over which he/she exercises or retains control] [which is used in common by tenants or others lawfully entitled to do so] in reasonably safe condition.

GIVEN:_____
District Judge

Source: See Section 27-1-701, MCA, cited in *Corrigan v. Janney*, 626 P.2d 838, 841, (1981); (Section 58-607, RCM (1947)) overruled on other grounds, *Meech v. Hillhaven West Inc.,* 776 P.2d 488 (1989); see also *Rennick v. Hoover*, 186 Mont. 167, 171, 606 P.2d 1079, 1081 (1980).

Comment: See Comment to MPI2d 12.00.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 12.04 Premises Liability - Leased Premises (Common Areas)

INSTRUCTION NO._____

If a landlord commences or attempts to repair or maintain the premises, he/she is under a duty to use reasonable care in such work.

GIVEN:_____
District Judge

Source: See *Parrish v. Witt*, 171 Mont. 101, 104-05, 555 P.2d 741, 743 (1976).

Comment: See Comment to MPI2d 12.00.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 12.05 Premises Liability - Leased Premises (Negligent Repairs)

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Chapter 13 - Contracts

INSTRUCTION NO. _____

A contract is an agreement between two [or more] persons to do or not to do a certain thing. It is essential to the existence of a contract that there should be:

1. persons capable of contracting,
2. consent of those persons,
3. a lawful object and
4. consideration.

GIVEN:_____
District Judge

NOTE: It is discretionary whether to include all four elements or only those which are in issue.

Source: Sections 28-2-101 and -102, MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

All persons are capable of contracting except minors and persons of unsound mind.

GIVEN:_____
District Judge

Source: See sections 28-2-201 to -204, MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 13.01 Contracts - Capacity to Contract

INSTRUCTION NO. _____

There is consent when there has been an offer and an acceptance of that offer. Consent exists when the contracting persons agree upon the same thing and communicate their agreement to one another. One party cannot make an agreement; all parties must, by their words or actions, consent to the agreement.

GIVEN:_____
District Judge

Source: See sections 28-2-301 to -512 and 28-3-301 to -306, MCA; see also *Modern Machinery v. Flathead County*, 202 Mont. 140, 144, 656 P.2d 206, 209 (1982).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

The object of a contract is the thing which the party receiving the consideration agrees to do or not to do. The object of a contract must be

(1) lawful when the contract is made,

(2) possible to perform, and

(3) capable of being determined by the time the contact is to be performed.

GIVEN:_____
District Judge

Note: Whether to include all elements, or only those in issue, is discretionary.

Source: Sections 28-2-601 and 602, MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 13.03 Contracts - Object of a Contract

INSTRUCTION NO._____

Consideration is something of value exchanged for a promise. Consideration includes any benefit to which the person receiving it was not otherwise lawfully entitled, or any detriment suffered or agreed to be suffered by such person. Detriment means any trouble or inconvenience which a person is not lawfully bound to suffer. Benefit means anything of value to the person receiving it even if such value is slight or trifling. You must not concern yourself with whether the consideration is a fair and adequate exchange for the promise. Fairness and adequacy are for the contracting persons to judge for themselves.

GIVEN:_____
District Judge

Source: See sections 28-2-801 to -814, MCA.

Comments: (1) If benefit or detriment is in issue, appropriate instructions should be given in addition to the above.

(2) Consider specific instructions where appropriate. E.g., love and affection; promises for future performance; moral obligation; reaffirmation of past legal obligation, such as a debt discharged in bankruptcy, etc.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

An offer is a proposal which is intended to become binding if it is accepted by the person to whom it is made. When an offer is made, it continues for the period of time expressed, a reasonable period if no time is expressed, or until revoked.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

To create a contract, an offer must be accepted by one having the right to accept it, while the offer is still open. The acceptance must be of the offer as communicated and without qualification.

GIVEN:_____
District Judge

Source: See *Sawyer-Adecor International v. Anglin*, 198 Mont. 440, 449-50, 646 P.2d 1194, 1199 (1982); see also sections 28-2-301(3) and 28-2-504, MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

An agreement may be established by the conduct of the parties without any words being expressed in writing or orally, if, from such conduct, it appears that the parties mutually intended to agree on all the terms. The same elements are essential to an implied contract as are essential to an express contract.

GIVEN:_____
District Judge

Source: See Sec. 28-2-103, MCA; see also *Erie v. Wahl*, 116 Mont. 515, 522, 155 P.2d 201, 204 (1945).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 13.07 Contracts - Implied Contract

INSTRUCTION NO. _____

The Court has determined that the intent of the parties in entering into the contract is unclear from the language of the contract itself. You must resolve this uncertainty by determining what the parties intended by the language used. In arriving at a determination of what the agreement was between the parties, you may consider:

GIVEN:_____
District Judge

Source: See sections 28-3-204, -206, -304, and -306, MCA; see also *SAS Partnership v. Schafer*, 200 Mont. 478, 482, 653 P.2d 834, 836 (1982).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 13.08 Contracts - Interpretation

INSTRUCTION NO. _____

A contract may be invalidated if it was obtained through the exercise of influence which destroyed the free will of one person and substituted for it the will of another person. This is known as ”undue influence” and it exists when a confidential relationship or a position of authority is used to take an unfair advantage of another’s weakness of mind, or to take a grossly oppressive and unfair advantage of another’s necessities or distress.

In determining whether undue influence has been exercised, you should consider all the evidence, which may include the nature of any confidential relationship shown to exist; the physical or mental condition of the person influenced as it affects the ability to withstand influence; the unnaturalness of an act or decision as it relates to showing an unbalanced mind or a mind easily susceptible to undue influence; and any demands made, and the persistence of those demands, as they affected the person influenced, taking into consideration the time, the place, and all of the surrounding circumstances.

GIVEN:_____
District Judge

Source: *In re Estate of Bradshaw*, 2001 MT 92, 305 Mont. 178, 24P.3d 211; §28-2-407, MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 13.09 Contracts - Undue Influence Consideration

INSTRUCTION NO. _____

There must be real and free consent by the parties to the terms of a contract. Consent is not real or free if it is obtained through [duress] [menace] [fraud] [undue influence] [mistake].

GIVEN:_____
District Judge

Source: See sections 28-2-401 to -411, MCA for specific definitions.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 13.10 Contracts - Duress, Fraud, Misrepresentation

INSTRUCTION NO. _____

A party may waive the benefit of a contract. Waiver means that a person is precluded from asserting a right, a claim or privilege because he/she has previously knowingly, voluntarily and intentionally given up that right, claim or privilege.

Waiver must be a voluntary act and implies a knowing choice by a person to give up something of value or forego a right or advantage which he/she might have demanded and insisted upon. It only involves the conduct of the party against whom the waiver is asserted and consideration is not necessary for the doctrine to apply, nor need there be a detriment or harm to the party claiming the waiver.

A person may waive a right, claim or privilege only if he/she has knowledge of the facts which are material or important to his/her decision. This knowledge may either be actual or constructive. Constructive knowledge is knowledge which one has the opportunity to acquire by the exercise of ordinary care and diligence, whether or not such knowledge is, in fact, acquired. If a person is ignorant of a material or important fact, that is, if he/she lacks actual or constructive knowledge, a waiver is not possible.

GIVEN:_____
District Judge

Source: *Matelich Construction v. Goodfellow Brothers*, 702 P.2d 967, 42 St. Rep. 1004 (1985).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 13.11 Contracts – Waiver

INSTRUCTION NO. _____

A waiver is defined by law as a voluntary and intentional relinquishment of a known right. Waiver must be based on the words or conduct of a party against whom waiver is claimed, in this case, the [Plaintiff]. The [Defendant] must prove that the [Plaintiff] unequivocally, voluntarily and intentionally relinquished his/her right to receive [describe benefit waived] as provided by the contract. Mere failure to take steps to enforce a legal right under a contract in a timely manner is not, by itself, sufficient to constitute proof of waiver.

GIVEN:_____
District Judge

Source: *Pipe Industry Insurance Fund Trust v. Consolidated Pipe Trades Trust*, 45 St. Rep. 1392, 1398 (1988).

Comment: This instruction is an alternative to MPI2d 13.11

INSTRUCTION NO. _____

The failure of a party to fully perform a contract is excused if his/her performance is prevented or delayed by the conduct of the other party.

GIVEN:_____
District Judge

Source: Section 28-1-1301, MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

A party may be barred from relying on the provisions of a contract if:

(1) his/her conduct, acts, language, or silence amount to a representation or a concealment of material facts;

(2) these facts are known to him/her at the time of his/her conduct;

(3) the truth concerning these facts was unknown to the other party at the time it was acted upon by him/her;

(4) the conduct was done with the intention, or expectation, that it would be acted upon by the other party, or under circumstances that it is both natural and probable that it would be so acted upon;

(5) the conduct was relied upon by the other party, and, thus relying, he/she was led to act upon it, and

(6) in fact acted upon it in such a manner as to change his/her position for the worse.

GIVEN:_____
District Judge

NOTE: Knowledge under the second element may be imputed under certain circumstances. See *Smith, supra*, and *Peterson v. School Board*, 73 Mont. 442, 236 Pac. 670 (1925).

Source: *Smith v. Krutar*, 153 Mont. 325, 332, 457 P.2d 459, 463 (1969), cited in *General Mills v. Zerbe Brothers*, 672 P.2d 1109, 1111, 40 St. Rep. 1830, 1833 (1983); see also section 26-1-601(1), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

There is no duty to perform a contract which is impossible for anyone to perform where the parties had no reason to foresee the impossibility at the time they contracted.

GIVEN:_____
District Judge

Source: See *Roundup Cattle Feeders v. Horpestad*, 184 Mont. 480, 485, 603 P.2d 1044, 1047 (1979); see also §28-2-602, MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 13.15 Contracts - Impossibility

INSTRUCTION NO. _____

A contract may be rescinded, or cancelled, if the consent of any person to the contract was given by mistake, or obtained through duress, menace, fraud or undue influence on the part of the party as to whom the contract is rescinded, or if consideration substantially or materially fails or becomes void. A contract may also be rescinded by consent of all parties to the agreement.

When all parties to a contract do not consent, rescission can be accomplished only if the party rescinding uses reasonable diligence to rescind promptly upon discovering the facts which entitle him/her to do so after he/she is free from duress, menace, undue influence or disability and aware of his/her right to do so, and he/she restores or offers to restore to the other party everything of value which he/she has received from him/her under the contract.

GIVEN:_____
District Judge

Source: Sections 28-2-1711 and -1713, MCA; *Turner v. Ferrin*, (1988), 232 Mont. 146, 757 P.2d 335, 339 (1988).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

For instructions governing sales, see Uniform Commercial Code, MCA Title 30, Chapters 2 and 11 and annotated cases.

INSTRUCTION NO. _____

In every contract there is an implied obligation of good faith and fair dealing on the part of both parties which requires that neither party do anything unreasonable which deprives the other of the benefits of the contract. The conduct required is honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. Violation of this obligation is a breach of the contract.

GIVEN: _____

District Judge

Source: See *Story v. City of Bozeman*, (1990), 242 Mont. 436, 791 P.2d 767.

Comment: Use for every contract, including those involving a special relationship, not covered by a specific statutory provision. The essential elements of a special relationship are set forth in *Story v. City of Bozeman*, (1990), 242 Mont. 436, 791 P.2d 767. Examples of specific statutory provisions regarding contracts are Sec. 39-2-901, et seq., MCA (employment); and Sec. 33-18-101 et seq., MCA (insurance).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G___ R___ W___

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Chapter 14 - Warranty

INSTRUCTION NO. _____

In this case, plaintiff seeks to establish liability on different theories, one of which is breach of warranty. A breach of warranty may be established without proof of negligence on the part of the defendant.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 14.00 Warranty - Transition

INSTRUCTION NO. _____

Any direct and positive representation of a fact made orally or in writing by the seller to the buyer which relates to the goods, which becomes part of the basis of the bargain between the buyer and seller, constitutes an express warranty that the goods shall conform to the representation.

[Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.]

[Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.]

GIVEN:_____
District Judge

Source: Section 30-2-313(1), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 14.01 Warranty - Express Warranty (General)

INSTRUCTION NO. _____

An express warranty may be created even though the seller does not use formal words such as "warrant" or "guarantee" and even though the seller does not have a specific intention to make a warranty.

GIVEN:_____
District Judge

Source: Section 30-2-313(2), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 14.02 Warranty - Express Warranty (Formal Words Not Required)

INSTRUCTION NO. _____

A statement purporting to be merely the seller's opinion or belief with respect to the transaction, or commendation of the goods does not create an express warranty. In determining whether statements made by the seller were an expression of opinion, as opposed to statements of fact, you may consider the surrounding circumstances under which the statement was made, the manner in which the statement was made and the ordinary effect of the words used. You may also consider the relationship of the parties and the subject matter with which the statement was concerned.

GIVEN:_____
District Judge

Source: Section 30-2-313(2), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 14.03 Warranty - Express Warranty (Statement of Opinion)

INSTRUCTION NO. _____

The buyer may rely on an express warranty even though he/she had the opportunity to but did not examine the goods before making the purchase. If he/she actually examined them, he/she may still rely on the seller's express warranty rather than his/her own examination as to any defect which is latent and concealed.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 14.04 Warranty - Express Warranty (Buyer's Examination of Goods)

INSTRUCTION NO. _____

An implied warranty arises by operation of law from the acts of the parties or circumstances of the transaction; it requires no intent or particular language or action by the seller to create it.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 14.05 Warranty - Implied Warranty (Generally)

INSTRUCTION NO. _____

Where goods are sold by a merchant who deals with such products, there is an implied warranty that the goods are at least reasonably fit for the ordinary purpose for which they are used, and

[would pass without objection in the trade under the contract description]

[in the case of fungible goods, such as is present here, are of fair average quality within the description]

[are fit for the ordinary purposes for which such goods are used]

[run within the variation permitted by the agreement, are of even kind, quality and quantity within each unit and among all units involved]

[are adequately contained packaged and labeled as the agreement may require]

[conform to the promises or affirmations of fact made on the container or label if any].

This is known as the implied warranty of merchantability.

GIVEN:_____
District Judge

Source: Section 30-2-314, MCA.

Comment: Bracketed items are minimum standards for merchantability. The court should instruct upon only those items which are in controversy.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

When the seller at the time of sale has reason to know any particular purpose for which the goods [product] are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods [product], there is an implied warranty that the goods [product] shall be fit for such purpose. This is known as the implied warranty of fitness for particular purpose.

GIVEN:_____
District Judge

NOTE: If instruction is required upon issues of modification or exclusion of implied warranties, see section 30-2-316, MCA.

Source: Section 30-2-315, MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 14.07 Warranty - Implied Warranty (Particular Purpose)

INSTRUCTION NO. _____

A builder-seller of a house impliedly warrants that it is constructed in a workmanlike manner and is suitable for habitation. This warranty applies to structural defects and defects in the land underlying the home which are made worse by the construction. If you find that plaintiff's house is not suitable for habitation as a result of such defects, then the builder-seller is liable, whether or not the builder-seller acted negligently and even though the plaintiff knew that such defects might exist at the time of the sale.

GIVEN:_____
District Judge

Source: See *Degnan v. Executive Homes*, (1985), 215 Mont. 162, 696 P.2d 431, 433-34; *Samuelson v. AA Quality Constr. Inc.*, (1988), 230 Mont. 220, 223, 749 P.2d 73.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 14.08 Warranty - Implied Warranty (Builder-Seller)

INSTRUCTION NO. _____

An implied warranty that a product as sold is of a particular quality or fit for a particular purpose may arise from [may be excluded or modified by] a [course of dealing] [usage of the trade].

[A "course of dealing" is previous conduct between the parties which establishes a common basis of understanding between them.]

[A "usage of trade" is any practice or method of dealing which is so regularly observed as to justify an expectation that it will be followed.]

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 14.09 Warranty - Implied Warranty (Course of Dealing or Usage of Trade)

INSTRUCTION NO. _____

If the buyer before making the purchase has examined the goods [or the sample] [or model] as fully as desired or has refused to make such examination when demanded by seller, there is no implied warranty from the seller as to defects which a reasonable examination ought in the circumstances to have revealed. The examination or refusal to examine will not, however, relieve the seller from liability for defects which could not have been discovered by a reasonable inspection.

GIVEN:_____
District Judge

Source: Section 30-2-316(3)(b), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 14.10 Warranty - Implied Warranty (Failure to Examine Product)

INSTRUCTION NO. _____

Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties.

[The implied warranty of merchantability, may also be excluded or modified, if, at the time of the sale, the seller specifically informs the buyer that any implied warranty as to merchantability is excluded or modified.]

[However, the implied warranty of fitness for a particular purpose may be excluded or modified only by a notice in writing to that effect or to the effect that there are no warranties which extend beyond the description of the goods.]

Any written exclusion or modification of an implied warranty set forth in writing must be plain and be conspicuous or it is of no effect.

GIVEN:_____
District Judge

Source: Section 30-2-316, MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 14.11 Warranty - Implied Warranty (Disclaimer)

INSTRUCTION NO. _____

A seller is not liable for a breach of warranty unless the buyer, within a reasonable time after he/she discovers or should have discovered any breach, notifies the seller of the breach. What is reasonable time depends upon the nature of the contract, the kind of goods involved and all the surrounding circumstances. The notice need not be in any particular form and it may be either oral or written. It must, however, fairly inform the seller of a breach of warranty and that the buyer looks to the seller for damages.

GIVEN:_____
District Judge

Source: Section 30-2-607, MCA.

Comment: The notice requirement of this section does not apply to a warranty claim by a consumer who has suffered personal injuries.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

Montana Pattern Instructions
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MPI 2d

Chapter 15 – Infliction of Severe Emotional Distress

INSTRUCTION NO_____

A party suffering harm as a result of the negligent (intentional) infliction of serious or severe emotional distress by another party is entitled to recover damages from that party for such harm.

GIVEN:_____
District Judge

Source: *Sacco v. High Country Independent Press, Inc.,* (1995). 271 Mont. 209, 896 P.2d 411. See also *Maloney v. Home & Investment Ctr., Inc.*, 2000 MT 34, 298 Mont. 213, 994 P.2d 1124.

Comment: Before instructions on the subject of emotional distress, the court must first determine that severe emotional distress can be found.

In *Sacco*, the Court held that the same elements are required for either the intentional infliction of emotional distress or the negligent infliction of emotional distress. Therefore, the plaintiff should choose "negligent" or "intentional" depending upon whether plaintiff is alleging intentional or negligent conduct on behalf of the defendant.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____ R____ W____

MPI2d 15.01 Infliction of Serious or Severe Emotional Distress - General

INSTRUCTION NO._____

To prove the negligent (intentional) infliction of serious or severe emotional distress, the plaintiff must show:

1. That he or she suffered serious or severe emotional distress; and
2. That the serious or severe emotional distress was a reasonably foreseeable consequence of the defendant's negligent (intentional) act or omission.

GIVEN:_____
District Judge

Source: *Sacco v. High Country Independent Press, Inc.,* 271 Mont. 209, 896 P.2d 411 (1995).

Comment: Before instructions on the subject of emotional distress, the court must first determine that severe or serious emotional distress can be found.

In *Sacco*, the Court held that the same elements are required for either the intentional infliction of emotional distress or the negligent infliction of emotional distress. Therefore, the plaintiff should choose "negligent" or "intentional" depending upon whether plaintiff is alleging intentional or negligent conduct on behalf of the defendant.

Proposed by P(#_____), D(#_____), Ct(#____)

Disposition G____ R____ W____

MPI2d 15.02 Infliction of Serious or Severe Emotional Distress - Elements

INSTRUCTION NO. _____

Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is severe that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable person could be expected to endure it. The intensity and duration of the distress are factors to be considered in determining its severity.

Given: _____
District Judge

Source: Restatement of Torts (Second), Sec. 46, cmt. J, cited by *Sacco v. High Country Independent Press, Inc.,* 271 Mont. 209, 896 P.2d 411 (1995), *Contreraz V. Michelotti-Sawyers*, 271 Mont. 300, 896 P.2d 1118 (1995).

Proposed by P(#_____), D(#_____), Ct(#_____)

Disposition G_____ R_____ W_____

MPI2d 15.03 Infliction of Severe Emotional Distress - Defined

Montana Pattern Instructions
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MPI 2d

Chapter 16 – Will Contests

INSTRUCTION NO. _____

A person who writes a Will is called a testatrix if a woman and a testator if a man. A person who wants the Will upheld is called a proponent. A person who wants the Will set aside is called a contestant.

Given:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G___ R___ W___

INSTRUCTION NO. _____

The contestant has the burden of proving lack of mental competence or undue influence.

Given:_____
District Judge

Source: 72-3-310, MCA

Proposed by P(#____), D(#____), Ct(#____)

Disposition G___ R___ W___

MPI2d 16.02 Will Contest - Burden of Proof

INSTRUCTION NO._____

A will may be invalidated if it was obtained through the exercise of influence which destroyed the free will of the [testator] [testatrix] and substituted for it the will of another person. This is known as undue influence and it exists when a confidential relationship or a position of authority is used to take an unfair advantage of the [testator's] [testatrix's] weakness of mind, or to take a grossly oppressive and unfair advantage of the [testator's] [testatrix's] necessities or distress.

In determining whether undue influence has been exercised, you should consider all the evidence, which may include the nature of any confidential relationship shown to exist; the physical or mental condition of the [testator] [testatrix] as it affects the ability to withstand influence; the unnaturalness of the disposition as it relates to showing an unbalanced mind or a mind easily susceptible to undue influence; and any demands made, and the persistence of those demands, as they affected the [testator] [testatrix], taking into consideration the time, the place, and all of the surrounding circumstances.

Given:_____
District Judge

Source: *In re Estate of Maricich*, 145 Mont. 146, 400 P.2d 873 (1965); *In re Estate of Bradshaw*, 2001 MT 92, 305 Mont. 178, 24 P.3d 211; §28-2-407, MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G___ R___ W___

MPI2d 16.03 Will Contest - Undue Influence (Consideration)

INSTRUCTION NO._____

Influence becomes undue only when it overcomes the true intention of the testator, so that his/her freedom of choice in making the Will is destroyed. In effect, it amounts to the substitution of the intention of another for that of the testator.

Given:_____
District Judge

Source: *In re Estate of Maricich*, (1965), 145 Mont. 146, 161, 400 P.2d 873, 881. Also see *Estate of Watson*, 227 Mont. 212, 738 P.2d 494 (1987); *Estate of Hogan*, 218 Mont. 428, 708 P.2d 1018 (1985); *Blackmer v. Blackmer*, 165 Mont. 69, 525 P.2d 539(1974).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G___ R___ W___

INSTRUCTION NO._____

Whether influence exercised on the testator was undue is to be determined by its effect upon the testator, given his/her physical and mental condition under the particular circumstances at the time the Will was made.

Given:_____
District Judge

Source: *In re Estate of Maricich*, 145 Mont. 146, 400 P.2d 873, 881 (1965).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G___ R___ W___

MPI2d 16.05 Will Contest - Undue Influence (Testator's Condition)

INSTRUCTION NO._____

Every mentally competent person over the age of 18 years may dispose of all of his/her property by a Will. The term "mentally competent" means that the testator has sufficient mental capacity and clearness of mind and memory to know in general, the nature and extent of the property which he/she owns, the nature of the act of making and signing a Will, and the names and his/her relationship to the people who are affected by his/her Will.

Given:_____
District Judge

Source: *Guardianship of Estate of Tennant*, 220 Mont. 78, 714 P.2d 122, 126 (1986); *Estate of Jochems*, 252 Mont. 24, 826 P.2d 534, 537 (1992)

Proposed by P(#____), D(#____), Ct(#____)

Disposition G___ R___ W___

INSTRUCTION NO. _____

A mentally competent testator is entitled to dispose of his/her property as he/she sees fit.

Given:_____
District Judge

Comment: Not to be used in a case in which undue influence is an issue.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G___ R___ W___

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MPI 2d

Chapter 25 - Damages

INSTRUCTION NO. _____

If you find for the plaintiff on the question of liability, then you must determine the amount of money which will reasonably and fairly compensate the plaintiff for all loss caused by the defendant(s), regardless of whether such loss could have been anticipated.

GIVEN:_____
District Judge

Comment: This is an introductory paragraph intended to be combined, in one instruction with other applicable damage instructions which follow.

(1) For personal injury cases see MPI2d 25.01

(2) For wrongful death cases, see MPI2d 25.20-25.22

(3) For survival cases, see MPI2d 25.25

(4) For property damage cases, see MPI2d 25.40

MPI2d 25.00 Negligence - First Paragraph

INSTRUCTION NO._____

Your award should include reasonable compensation for any pain and suffering experienced and reasonably probable to be experienced in the future.

The law does not set a definite standard by which to calculate compensation for mental and physical pain and suffering. Neither is there any requirement that any witness express an opinion about the amount of compensation that is appropriate for this kind of loss. The law does require, however, that when making an award for pain and suffering, you shall exercise calm and reasonable judgment. The compensation must be just and reasonable.

GIVEN:_____
District Judge

Source: *Tynes v. Bankers Life Co.*, 224 Mont. 350, 730 P.2d 1115 (1987); *Johnson v. Murray*, 201 Mont. 495, 656 P.2d 170 (1982).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

Your award should include reasonable compensation for any mental and emotional suffering and distress experienced by plaintiff and reasonably probable to be experienced in the future.

Mental and emotional suffering and distress passes under various names, such as mental anguish, nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nauseau.

The law does not set a definite standard by which to calculate compensation for mental and emotional suffering and distress. Neither is there any requirement that any witness express an opinion about the amount of compensation that is appropriate for this kind of loss. The law does require, however, that when making an award for mental and emotional suffering and distress, you shall exercise calm and reasonable judgment. The compensation must be just and reasonable.

GIVEN: _____
District Judge

Comment: This instruction should be given where emotional distress damages are allowed in the absence of independent tort claims for negligent or intentional infliction of emotional distress. For independent tort claims of negligent or intentional infliction of emotional distress, instruct separately un MPI2d 15.01 et seq.

Proposed by P(#_____), D(#_____), Ct (#_____)
Disposition G_____ R_____ W_____

MPI2d 25.02 Damages – Personal Injury (Emotional Distress - Generally)

INSTRUCTION NO._____

Your award should include the reasonable value of any loss sustained to date because of plaintiff's inability to pursue an occupation. In determining what plaintiff reasonably could have earned had there been no injury, you should consider evidence of plaintiff's earning capacity, past earnings, and the manner in which he/she ordinarily would have occupied his/her time before the injury. A person may have an earning capacity, even though not employed.

GIVEN:_____
District Judge

Sources: *Walls v. Rue*, 233 Mont. 236, 759 P.2d 169 (1988); *Putnam v. Pollei*, 153 Mont. 406, 457 P.2d 776 (1969); *Keck v. Bairs, Inc.*, 150 Mont. 562, 437 P.2d 380 (1968); *Tynes v. Bankers Life Co.,* 224 Mont. 350, 730 P.2d 1115 (1987).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.03 Damages - Personal Injury (Lost Earning Capacity To Date)

INSTRUCTION NO._____

Your award should include reasonable compensation for any loss of future earning capacity. You should consider evidence of plaintiff's health, physical ability, and earning capacity before the accident, and what they are now. You should also consider the nature, extent and duration of the injuries. A person may have an earning capacity, even though not employed.

GIVEN:_____
District Judge

Sources: *Smith-Carter v. Amoco Oil Co.*, 248 Mont. 505, 813 P.2d 405 (1991); *Putnam v. Pollei*, 153 Mont. 406, 457 P.2d 776, (1969); *Keck v. Bairs, Inc.,* 150 Mont. 562, 437 P.2d 380 (1968); and *Tynes v. Bankers Life Co.,* 224 Mont. 350, 730 P.2d 1115 (1987).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.04 Damages - Personal Injury (Future Earning Capacity)

INSTRUCTION NO._____

Your award should include the reasonable value of any service, whether paid or not, which plaintiff would normally have performed for himself/herself or others, but can no longer perform.

GIVEN:_____
District Judge

Source: *Kuhnke v. Fisher*, 210 Mont. 114, 683 P.2d 916 (1984)

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.05 Damages - Personal Injury (Reasonable Value of Services)

INSTRUCTION NO._____

Your award should include the reasonable value of purchases necessitated by the injury.

GIVEN:_____
District Judge

Source: *Simchuk v. Angel Island Com. Ass'n.*, 253 Mont. 221, 833 P.2d 158 (1992); *Tynes v. Bankers Life Co.,* 224 Mont. 350, 730 P.2d 1115 (1987).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.06 Damages - Personal Injury (Reasonable Value of Purchases)

INSTRUCTION NO._____

Your award should include the reasonable value of necessary care, treatment and services received and those reasonably probable to be required in the future.

GIVEN:_____
District Judge

Source: *Johnson v. United States*, (D. Mont. 1981), 510 F.Supp. 1039, *rev.d on other grounds,* 704 F.2d 143, and *Anderson v. Burlington Northern, Inc.*, 218 Mont. 456, 709 P.2d 641 (1985), and *Tynes v. Bankers Life Co.,* (1987), 224 Mont. 350, 730 P.2d 1115.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

If you find that the plaintiff has been permanently injured or will continue to suffer in the future from his/her injuries, you may award plaintiff reasonable compensation for the impairment, if any, of his/her capacity to pursue an established course of life. This element of compensation is distinct from plaintiff's loss of earning capacity.

GIVEN:_____
District Judge

Source: See MJIG 30.06.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.08 Damages - Personal Injury (Established Course of Life)

INSTRUCTION NO. _____

Where a pre-existing condition has been aggravated by the accident, it is your duty, if possible, to apportion the amount of disability and pain between that caused by the pre-existing condition and that caused by the accident and compensate the plaintiff for that caused by the accident. But, if you find that the evidence does not permit such an apportionment, then the defendant is liable for the entire disability and pain.

GIVEN:_____
District Judge

Source: See *Callihan v. Burlington Northern*, (1982), 201 Mont. 350, 357, 654 P.2d 972, 976. See *Priest v. Taylor*, (1987), 227 Mont. 370, 740 P.2d 648, regarding possible instruction on burden of proof.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____ R____ W____

MPI2d 25.09 Damages - Personal Injury (Pre-Existing Condition)

INSTRUCTION NO. _____

Any compensation to which plaintiff is entitled should not be reduced simply because plaintiff was more susceptible to injury than a normally healthy person.

GIVEN:_____
District Judge

Proposed by P(#___). D(#___), Ct(#____)

Disposition G___ R___ W___

MPI2d 25.10 Damages - Personal Injury (Susceptible Plaintiff)

INSTRUCTION NO. _____

The defendant is liable to the plaintiff for the results of medical treatment even where such treatment is itself negligent, so long as the plaintiff exercised reasonable care in his/her selection of a physician.

GIVEN:_____
District Judge

Source: *Callihan v. Burlington Northern*, 201 Mont. 350, 357-58, 654 P.2d 972, 976 (1982) (citing Restatement (Second) of Torts, Sec. 457, Comment (a) (1965).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G___ R___ W___

MPI2d 25.11 Damages - Personal Injury (Plaintiff's Choice of Physician - Where Aggravated by Medical Treatment)

INSTRUCTION NO._____

( ) Your award should include reasonable compensation to _____ as a result of _____'s death. You should consider any financial support which _____ would have received or had a right to receive from the deceased except for the death, and also the value of the society, comfort, guidance, education, care, protection, and companionship which _____ has lost by reason of the death.

[You should consider: the age of the deceased and of _____; the state of health and physical condition of the deceased and _____ as it existed at the time of the death and prior thereto; their respective expectancies of life as shown by the evidence; the disposition of the deceased whether it was kindly, affectionate or otherwise; whether the deceased showed an inclination to contribute to the support of _____; the earning capacity of the deceased and the monetary value of the deceased's non-compensated services to the household; and such other facts shown by the evidence as throw light upon the value of the support, society, care, comfort,

companionship and protection which the _____ reasonably might have expected to receive from the deceased had _____ lived.]

GIVEN:_____
District Judge

Source: *Swanson v. Champion Int'l. Corp.,* (1982), 197 Mont. 509, 646 P.2d 1166.

Comments:

(1) Use with MPI2d 25.00.

(2) Survival and wrongful death claims must be brought in a single action. Section 27-1-501(2), MCA states any element of damages may be recovered only once.

(3) The Commission makes no recommendation as to use of bracketed materials.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

( ) Reasonable compensation for burial expenses and funeral services for the deceased and any reasonable medical charges which were incurred in connection with the death.

GIVEN:_____
District Judge

Comments: (1) Use with MPI2d 25.00.
(2) Survival and wrongful death claims must be brought in a single action. Section 27-1-501(2), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.21 Damages - Wrongful Death (Funeral and Medical Expenses)

INSTRUCTION NO. _____

( ) Reasonable compensation for grief, sorrow and mental anguish resulting from the death.

GIVEN:_____
District Judge

NOTE: No Montana case under the facts presented has expressly allowed damages for grief to a surviving spouse, but the reasoning in *Dawson*, 671 P.2d, at 590, 40 St. Rep., at 1690 (citing Section 27-1-323, MCA, applicable to all wrongful death cases), seems to permit it.

Sources: *See Dawson v. Hill & Hill Truck Lines*, (1983), 206 Mont. 325, 671 P.2d 589, 594, (recovery by parents of deceased minor); *Ewalt v. Scott*, (1985), 206 Mont. 503, 675 P.2d 77, (recovery by child of deceased parent); see also Sections 27-1-323, -512 and 513, MCA.

Comments: (1) Use with MPI2d 25.00.
(2) Survival and wrongful death claims must be brought in a single action. Section 27-1-501(2), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

( ) Your award should include [reasonable compensation to decedent's estate for:]

[reasonable compensation for damages suffered by decedent if you find death was not instantaneous. Your award should then include reasonable compensation to decedent's estate for:]

the amount of decedent's lost earnings between the time of injury and the time of death; the present value of decedent's reasonable earnings after the date of death during the remainder of his/her life expectancy; the medical and funeral expenses which were incurred as a result of the injury and death; reasonable compensation for decedent's conscious mental and physical pain and suffering in the interval between injury and death.

GIVEN:_____
District Judge

Source: See *Swanson v. Champion International*, 197 Mont. 509, 515, 646 P.2d 1166, 1169 (1982) (citing Section 27-1-501, MCA); see also *Stephens v. Brown*, 160 Mont. 453, 503 P.2d 667 (1972).

Comments: (1) Use with MPI2d 25.00.
(2) Survival and wrongful death claims must be brought in a single action. Section 27-1-501(2), MCA states any element of damages may be recovered only once.
(3) Use first bracketed paragraph if there is no issue as to survival. If survival is in issue, use second bracketed paragraph.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO.

Life expectancy, as shown by the mortality table, is an estimate of the probable average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete but only a limited record of experience. So the inference which may be drawn from the life expectancy shown by the table applies only to one who has the average health and exposure to danger of people of that age. In considering the [plaintiff's] [decedent's] life expectancy, you should consider in addition to what is shown by the table of mortality, all other facts and circumstances in evidence bearing on his/her life expectancy, including his/her occupation, habits and state of health.

According to life expectancy tables, the life expectancy of a person of [plaintiff's] [decedent's] age and sex is _____ years. This fact, of which the court takes judicial notice, is now in evidence to be considered by you in arriving at the amount of damages to be awarded to the plaintiff.

GIVEN:_____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.30 Damages - Mortality Table

INSTRUCTION NO. _____

In addition to considering [plaintiff's] [decedent's] life expectancy, as given to you in the preceding instruction, you may also take into account his/her probable work expectancy in arriving at the amount of your verdict. According to statistics provided by the United States Department of Labor, the average number of remaining years of probable work expectancy for a like person is _____ years.

The court also takes judicial notice of this fact, which is now in evidence to be considered by you.

GIVEN: _____
District Judge

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.31 Damages - Work Expectancy

INSTRUCTION NO. _____

If you find the defendant is liable you may award damages for the loss or impairment of the marriage relation suffered by the plaintiff. This relation includes the right of support, aid, protection, affection and society. If those rights have been lost or impaired by an injury to the [wife] [husband], you should consider and assign values to them in reaching a separate verdict for the [wife] [husband].

GIVEN:_____
District Judge

Source: *Duttin v. Hightower and Lubrecht Construction Co.*, (D.Mont. 1963), 214 F.Supp. 298; *Duffy v. Lipsman-Fulkerson & Co.*, (D. Mont. 1961), 200 F.Supp. 71; and *Bain v. Gleason*, (1986), 223 Mont. 442, 728 P.2d 1153.

Comment: Loss of financial support may be an element of damages in both a loss of consortium claim and a related injury claim, but it may be recovered only once.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.32 Damages - Loss of Consortium

INSTRUCTION NO._____

( ) Your award should include reasonable compensation for damage to personal property which is either (a) the cost of repair, or (b) the difference in the value of the property immediately before and immediately after the damage, whichever is less.

GIVEN:_____
District Judge

Comment: Use with MPI2d 25.00

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

( ) Your award should include reasonable compensation for any loss of use of any damaged property during the time reasonably required for its repair.

GIVEN:_____
District Judge

Comments:
(1) Use with MPI2d 25.00.
(2) Appropriate in cases where personal property is damaged and capable of repair.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

( ) Your award should include lost profit or other prospective gain from the operation of plaintiff's business. Damages for lost profits or other gains are recoverable only to the extent that the evidence affords a reasonable basis for their determination. However, recovery cannot be denied simply because damages are difficult to determine.

GIVEN:_____
District Judge

NOTE: For negligent misrepresentation, see *State Bank v. Maryann's, Inc.*, (1983), 204 Mont. 21, 664 P.2d 295, 301-02.

Source: *See Hostetter v. Dunlap*, (1986), 221 Mont. 380, 382-83, 719 P.2d 1243, 1245.

Comment: Use with MPI2d 25.00.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

Damages are recoverable in this action for loss caused or for profit and other gain prevented by defendant's breach only to the extent that the evidence affords a reasonable basis for estimating their amount in money. Damages which are a matter of mere speculation cannot be the basis of recovery. Recovery cannot be denied for damages simply because they are difficult to determine.

GIVEN:_____
District Judge

Source: See *Hostetter v. Dunlap*, (1986), 221 Mont. 380, 382-83, 719 P.2d 1243, 1245.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.43 Damages - Lost Profits (Contract)

INSTRUCTION NO. _____

Plaintiff has asked for punitive damages which may be allowed by you provided you first find that the plaintiff has suffered actual damage. One who has suffered injury to his/her person or property through the oppression, fraud, or malice of another may recover, in addition to his/her actual damages, damages for the sake of example and by way of punishing the other party.

GIVEN:_____
District Judge

Source: See section 27-1-221(1), MCA.

Comment: Use only in causes of action arising prior to 10/1/87.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.60 Damages - Punitive Damages
(Introductory - pre 10/1/87)

INSTRUCTION NO. _____

Plaintiff has asked for punitive damages which may be allowed by you provided you first find that the plaintiff has suffered actual damage. One who has suffered injury to his/her person or property through the fraud or malice of another may recover, in addition to his/her actual damages, damages for the sake of example and by way of punishing the other party.

GIVEN:_____
District Judge

Source: See section 27-1-221(1), MCA; see also MJIG 35.00

Comment: Applies only to causes of action arising after 10/1/87.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.61 Damages - Punitive Damages
(Introductory - post 10/1/87)

INSTRUCTION NO. _____

Plaintiff must prove all the elements of the claim for punitive damages by clear and convincing evidence. "Clear and convincing" means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. The elements may be proved by direct or circumstantial evidence.

GIVEN: _____
District Judge

Sources: See Sections 26-1-102 and 27-1-221(2), MCA. Also see *Mydlarz v. Palmer/Duncan Const. Co.,* (1984), 209 Mont. 325, 345, 682 P.2d 695, 705.

Comment: Use this instruction only in cases arising after April 16, 1985 (effective date of statute).

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.62 Damages - Punitive Damages (Burden of Proof - Circumstantial Evidence)

INSTRUCTION NO. _____

Oppression exists if a person intentionally causes cruel and unjust hardship by misusing or abusing authority or power or taking advantage of some weakness, disability or misfortune of another person.

GIVEN:_____
District Judge

Source: See section 27-1-221(5), MCA.

Comment: Applies only to causes of action arising before 10/1/87.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

In punitive damage cases the law defines fraud as either the making of a representation by the defendant with knowledge of its falsity or concealing a material fact with the purpose of depriving the plaintiff of his/her property or legal rights or otherwise causing him/her injury.

Fraud for punitive damages exists only where the plaintiff has a right to rely upon the representation of the defendant and suffers injury to his/her property or legal rights or is otherwise damaged as a result of such reliance.

GIVEN: _____
District Judge

Source: Section 27-1-221, MCA

Comment: Applies only to causes of action arising after 10/1/87.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

In punitive damage cases the defendant is guilty of malice if he/she has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and defendant either:

(a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or

(b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

GIVEN: _____
District Judge

Source: Section 27-1-221, MCA

Comment: Applies to cases arising after 10/1/87.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

In determining the amount of punitive damages, you should consider all of the attendant circumstances, including the nature, extent and enormity of the wrong, the intent of the party committing it, the amount allowed as actual damages, and, generally, all of the circumstances attending the particular act involved, including any circumstances which may operate to reduce without wholly defeating punitive damages.

Punitive damages should be of such an amount as will deter the defendant from and warn others against similar acts of misconduct. Thus, the wealth of the defendant is a fact to be considered by you in determining the amount of punitive damages.

GIVEN: _____
District Judge

Source: See section 27-1-221(7), MCA; see also *Gibson v. Western Fire Insurance*, (1984), 210 Mont. 267, 682 P.2d 725.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI 25.66 Damages - Punitive Damages - Determination

INSTRUCTION NO. _____

You are permitted to award compensation only for future loss or harm which is reasonably certain to occur. Recovery cannot be denied for damages simply because they are difficult to determine.

GIVEN: _____
District Judge

Source: See section 27-1-203, MCA, cited in *Frisnegger v. Gibson*, 183 Mont. 57, 70-71, 598 P.2d 574, 582 (1979); *State Bank v. Maryann's Inc.*, (1983), 204 Mont. 21, 35-36, 664 P.2d 295, 302-03, (forecast of earnings admissible); see also *Hostetter v. Dunlap*, (1986), 221 Mont. 380, 382-83, 719 P.2d 1243, 1245, (difficulty of determination); see also *Stensvad v. Miner's & Merchant's Bank*, (1982), 196 Mont. 193, 640 P.2d 1303.

Comments: (1) When used, this instruction should be given after the second paragraph in MPI2d 25.00.
(2) In cases where susceptibility to future damage or loss of chance is an issue, the Commission makes no recommendation as to applicability of this instruction.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO._____

You must adjust future economic losses to their present cash value.

Present cash value is a sum of money which, together with what that money may reasonably be expected to earn in the future, when invested at a reasonable rate of return, will produce the dollar equivalent of such future damages.

In arriving at present cash value, you may also consider the effect that inflation and increases in wages will have on offsetting the amounts that money will earn.

The only amounts to be adjusted to present cash value are future earnings [and future medical costs]. The discount principles stated in this instruction do not apply to any other damages.

GIVEN: _____
District Judge

Source: See *Torchia v. Burlington Northern*, 174 Mont. 83, 93, 568 P.2d 558, 564 (1977); *Resner v. No. Pac. Ry. Co.,* (1977), 174 Mont. 83, 568 P.2d 558, see also *Johnson v. United States*, 510 F. Supp. 1039, 1045 (D.Mont. 1981), modified, 704 F.2d 1431 (9th Cir. 1983); Restatement (Second) of Torts, Section 913A, Comment (a) (1979).

Comment: A present value instruction should not be given unless there is sufficient foundation in the testimony to allow the jury to make the adjustment.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.91 Damages - Present Value

INSTRUCTION NO. _____

You can determine the present cash value of future economic damage by use of the present value table which is attached. To use this table, you should take the following steps:

1. Determine the number of years from now that the future economic loss will continue, and locate that figure on the left-hand column of the table.

2. Choose a fair rate of interest on reasonably safe investments, and use the column headed up by that percentage rate for your further calculations.

3. Using the number of years and percentage rate of investment which you have determined, next ascertain the present value factor from the table.

4. Multiply the factor so determined times the amount of economic loss you determine will occur in each year.

The result will be the present amount which, invested at the determined rate of investment return, will pay at the end of each year the determined annual amount for the number of years you find that the loss will continue, and it will leave nothing at the end of that period.

The following is only an example to assist you in the proper use of the table. It is not to be construed as a suggestion by the court as to what numbers you should apply. For sake of example, assume that future economic losses will continue for 10

years. Also assume that a reasonable safe rate of investment return is determined to be 6%. Read across from the 10-year entry to the 6% column, and you find that the present value factor is 7.3601. Then assume that you find the future economic loss for each of those 10 years to be $10,000.00. Now simply multiply the factor (7.3601) times the annual loss ($10,000.00), and you will find that the present value of $10,000.00 per year payable each year for 10 years is $73,601.00.

You, of course, should use your judgment in determining which time period, interest rate and annual loss most justly fit the facts of the case before you.

GIVEN: _____
District Judge

Comments: (1)This optional instruction may be used following the present value instruction, MPI 25.91.
(2)A present value instruction should not be given unless there is sufficient foundation in the testimony to allow the jury to make the adjustment.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

PRESENT VALUE CALCULATION

Years	*1%*	*1 ½ %*	*2%*	*2 ½ %*	*3%*	*3 ½%*	*4%*	*6%*	*8%*	*10%*	*12%*	*14%*
1	.9901	.9852	.9804	.9758	.9709	.9815	.9524	.9434	.9259	.9091	.8529	.8772
2	1.9704	1.9559	1.9418	1.9274	1.9135	1.8851	1.8594	1.8334	1.7833	1.7355	1.6901	1.6487
3	2.9410	2.9122	2.8839	2.8560	2.8286	2.7751	2.7232	2.6730	2.5771	2.4869	2.4018	2.3216
4	3.9020	3.8544	3.8077	3.7620	3.7171	3.6299	3.5459	3.4651	3.3121	3.1699	3.0373	2.9137
5	4.8534	4.7826	4.7135	4.6458	4.5797	4.4518	4.3295	4.2124	3.9927	3.7908	3.6048	3.4331
6	5.7955	5.6972	5.6014	5.5081	5.4172	5.2421	5.0757	4.9173	4.6229	4.3553	4.1114	3.8887
7	6.7282	6.5982	6.4720	6.3494	6.2303	6.0021	5.7863	5.5824	5.2064	4.8684	4.5638	4.2883
8	7.6517	7.4859	7.3255	7.1701	7.0197	6.7327	6.4632	6.2098	5.7466	5.3349	4.9676	4.8389
9	8.5660	8.3605	8.1622	7.9709	7.7851	7.4353	7.1078	6.8017	6.2469	5.7590	5.3282	4.9464
10	9.4713	9.2222	8.9828	8.7521	8.5302	8.1109	7.7217	7.3601	6.7101	6.1446	5.6502	5.2161
11	10.3676	10.0711	9.7868	9.5142	9.2526	8.7605	8.3064	7.8869	7.1390	6.4951	5.9377	5.4527
12	11.2551	10.9075	10.5753	10.2578	9.9540	9.3851	8.8632	8.3838	7.5361	6.8137	6.1944	5.6603
13	12.1337	11.7315	11.3484	10.9832	10.6350	9.9856	9.3935	8.8527	7.9038	7.1034	6.4235	5.8424
14	13.0037	12.5434	12.1062	11.6909	11.2961	10.5631	9.8986	9.2950	8.2442	7.3667	6.6282	6.0021
15	13.8651	13.3432	12.8493	12.3814	11.9379	11.1184	10.3796	9.7122	8.5595	7.6061	6.8109	6.1422
16	14.7179	14.1313	13.5777	13.0550	12.5611	11.6523	10.8377	10.1059	8.8514	7.6237	6.9740	6.2651
17	15.5623	14.9076	14.2919	13.7122	13.1661	12.1657	11.2740	10.4773	9.1216	8.0216	7.1196	6.3729
18	16.3983	15.6726	14.9920	14.3534	13.7535	12.6593	11.6895	10.8276	9.3719	8.2014	7.2497	6.4674
19	17.2260	16.4262	15.6785	14.9789	14.3238	13.1339	12.0853	11.1581	9.6036	8.3649	7.3658	6.5504
20	18.0456	17.1686	16.3514	15.5892	14.8775	13.5903	12.4622	11.4699	9.8181	8.5136	7.4694	6.6231
21	18.8570	17.9001	17.0112	16.1845	15.4150	14.0292	12.8211	11.7640	10.0168	8.6487	7.5620	6.6870
22	19.6604	18.6208	17.6580	16.7654	15.9369	14.4511	13.1630	12.0416	10.2007	8.7715	7.6446	6.7429
23	20.4558	19.3309	18.2922	17.3321	16.4436	14.8568	13.4885	12.3034	10.3711	8.8832	7.7164	6.7921
24	21.2434	20.0304	18.9139	17.8850	16.9355	15.2470	13.7986	12.5504	10.5288	8.9847	7.7843	6.8351
25	22.0232	20.7195	19.5235	18.4244	17.4131	15.6221	14.0939	12.7834	10.6748	9.0770	7.8431	6.8729
26	22.7952	21.3986	20.1210	18.9506	17.8768	15.9828	14.3752	13.0032	10.8100	9.1609	7.8957	6.9061
27	23.5596	22.0676	20.7069	19.4640	18.3270	16.3296	14.6430	13.2105	10.9352	9.2372	7.9426	6.9352
28	24.3164	22.7267	21.2813	19.9649	18.7641	16.6631	14.8981	13.4062	11.0511	9.3066	7.9844	6.9607
29	25.0658	23.3761	21.8444	20.4535	19.1885	16.9837	15.1411	13.5907	11.1584	9.3696	8.0218	6.9830
30	25.8077	24.0158	22.3965	20.9303	19.6004	17.2920	15.3725	13.7648	11.2578	9.4269	8.0552	7.0027
31	26.5423	24.6461	22.9377	21.3954	20.0004	17.5885	15.5928	13.9291	11.3498	9.4790	8.0850	7.0199
32	27.2696	25.2671	23.4683	21.8492	20.3888	17.8736	15.8027	14.0840	11.4350	9.5264	8.1116	7.0350
33	27.9897	25.8790	23.9886	22.2919	20.7658	18.1476	16.0025	14.2302	11.5139	9.5694	8.1354	7.0482
34	28.7027	26.4817	24.4986	22.7238	21.1318	18.4112	16.1929	14.3681	11.5869	9.6086	8.1566	7.0599
35	29.4086	27.0756	24.9986	23.1452	21.4872	18.6646	16.3742	14.4982	11.6546	9.6442	8.1755	7.0700
36	30.1075	27.6607	25.4888	23.5563	21.8323	18.9083	16.5469	14.6210	11.7172	9.6765	8.1924	7.0790
37	30.7995	28.2371	25.9695	23.9573	22.1672	19.1426	16.7113	14.7368	11.7752	9.7059	8.2075	7.0868
38	31.4847	28.8051	26.4406	24.3486	22.4925	19.3679	16.8679	14.8460	11.8289	9.7327	8.2210	7.0937
39	32.1630	29.3646	26.9026	24.7303	22.8082	19.5845	17.0170	14.9491	11.8786	9.7570	8.2330	7.0997
40	32.8347	29.9158	27.3555	25.1028	23.1148	19.7928	17.1591	15.0463	11.9246	9.7791	8.2438	7.1050
41	33.4997	30.4590	27.7995	25.4661	23.4124	19.9931	17.2944	15.1380	11.9672	9.7991	8.2534	7.1097
42	34.1581	30.9941	28.2348	25.8206	23.7014	20.1856	17.4232	15.2245	12.0067	9.8174	8.2619	7.1138
43	34.8100	31.5212	28.6616	26.1664	23.9819	20.3708	17.5459	15.3062	12.0432	9.8340	8.2696	7.1173
44	35.4555	32.0406	29.0800	26.5038	24.2543	20.5488	17.6628	15.3832	12.0771	9.8491	8.2764	7.1205
45	36.0945	32.5523	29.4902	26.8330	24.5187	20.7200	17.7741	15.4558	12.1084	9.8628	8.2825	7.1232
46	36.7272	33.0565	29.8923	27.1542	24.7754	20.8847	17.8801	15.5244	12.1374	9.8753	8.2880	7.1256
47	37.3537	33.5532	30.2866	27.4675	25.0247	21.0429	17.9810	15.5890	12.1643	9.8866	8.2928	7.1277
48	37.9740	34.0426	30.6731	27.7732	25.2667	21.1951	18.0772	15.6500	12.1891	9.8969	8.2972	7.1296
49	38.5881	34.5247	31.0521	28.0714	25.5017	21.3415	18.1687	15.7076	12.2122	9.9063	8.3010	7.1312
50	39.1961	34.9997	31.4235	28.3623	25.7298	21.4822	18.2559	15.7619	12.2335	9.9148	8.3045	7.1327

INSTRUCTION NO._____

The plaintiff has a duty to minimize his/her damages. However, that duty does not require him/her to do what is unreasonable or impracticable, [and, consequently, when expenditures are necessary for minimization of damages, a person who is financially unable to make such expenditures has no duty to minimize.]

GIVEN: _____
District Judge

Source: See *McPherson v. Kerr*, 195 Mont. 454, 460, 636 P.2d 852, 856 (1981); see also *Brown v. Webb*, 173 Mont. 275, 283-84, 567 P.2d 450, 455 (1977); and *Cuddy v. U.S.,* 490 F.Supp. 390 (D. Mont. 1980).

Comment: Use bracketed material where applicable.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

INSTRUCTION NO. _____

If you find that the plaintiff is entitled to recover damages against more than one defendant, you must nevertheless return a verdict in one single sum against all the defendants you find to be liable. You must not allocate the damages between [among] the defendants.

GIVEN: _____
District Judge

Source: See section 27-1-703(1), MCA.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.95 Damages - Multiple Defendants (Joint and Several Liability)

INSTRUCTION NO. _____

You must determine in your verdict the percentage of negligence attributable to each person whose name appears on the special verdict form which will be submitted to you. Your verdict must apportion the percentage of negligence of all such persons, so that your separate percentages, when added together, equal one hundred percent.

After your verdict is returned, the court will apportion the dollar amount of your verdict in accordance with the percentages you have determined.

After your verdict is returned, the court will enter judgment for and against the persons who are parties to this lawsuit in accordance with your verdict.

GIVEN: _____
District Judge

Source: Section 27-1-703(2), (3), (4) MCA

Comment: MCA section 27-1-703(4) prohibits the consideration of certain employers and co-employees as "immune" parties.

Proposed by P(#____), D(#____), Ct(#____)

Disposition G____R____W____

MPI2d 25.96 Damages - Multiple Defendants (Joint and Several Liability)